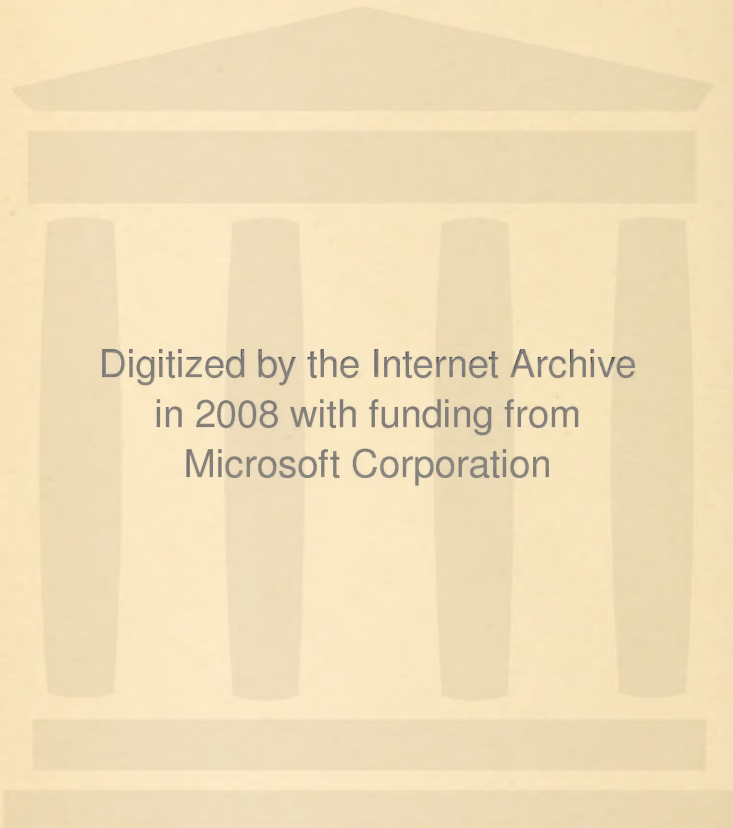
T
G7932p
1888

v.3

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

W. C. Dent.


Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/chipmanprop03gray

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

BY

JOHN CHIPMAN GRAY,

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

VOLUME III.

CAMBRIDGE:
CHARLES W. SEVER.
1889.

Copyright, 1889,
By John Chipman Gray.

T
G7932p
1888

University Press:
John Wilson and Son, Cambridge.

TABLE OF CONTENTS.

Page

TABLE OF CASES ix

TABLE OF STATUTES xiii

BOOK VI.

ACQUISITION OF REAL ESTATE INTER VIVOS 1

CHAPTER I.

ORIGINAL ACQUISITION 1

CHAPTER II.

LAPSE OF TIME 31

§ 1. Statutes of Limitation 31

A. Statutes 34

B. Operation of the Statute 37

C. Disseisin and Adverse Use 43

D. Constructive Possession 88

E. Disabilities 104

F. Tacking Interests 109

§ 2. Prescription 127

Note on Involuntary Transfer — Forfeiture — Execution — Bankruptcy — Marriage — Liens 224

CHAPTER III.

Page
The Form of Conveyances 225
Note on Conveyances by Record 225
A. Fines and Recoveries 225
B. Feoffments 226
Note on Conveyance by Special Custom 226
§ 1. Conveyance to Strangers 227
2. Releases 236
3. Surrenders 240
Note on Exchange 278
Note on Form of Conveyance 279
Note on Recital of Consideration 280

CHAPTER IV.

Description of Property granted 281
§ 1. Land not Appurtenant to Land 281
2. Boundaries 285
A. In general 285
B. On Water 319
C. On Ways 331

CHAPTER V.

Estates created 386
§ 1. Estates in Fee Simple 386
2. Estates Tail 398
3. Estates for Life 404
4. Estates for Years, from Year to Year, and at Will 409
Note on Statute Merchant, Statute Staple, and Elegit 411

CHAPTER VI.

Incorporeal Hereditaments 465
Note on the *Habeas Corpus* 480

CHAPTER VII.

Covenants for Title 500

CHAPTER VIII.

Page
EXECUTION OF DEEDS 613
Note on Conveyance by Discussee 614
§ 1. Signing and Sealing 619
Note on the Applicability of the Statute of Frauds to Deeds 619
Note on Seals 624
2. Delivery 633
Note on the Cancellation of Deeds 735

CHAPTER IX.

ESTOPPEL 739

CHAPTER X.

DEDICATION 788

TABLE OF CASES.

	Page
Agricultural Bank *v.* Rice	622
Anderson *v.* Prindle	446
Andrew *v.* Pearce	738
Angus *v.* Dalton	141
Archer *v.* Bennett	281
Ashcroft *v.* Eastern R. R. Co.	587
Auer *v.* Penn	273
Bailey *v.* Carleton	99
Ball *v.* Dunsterville	624 *n.*
Bangor House Proprietary *v.* Brown	354
Barlow *v.* Rhodes	474
—— *v.* Wainwright	450
Bastow, Doe *d.*, *v.* Cox	432
Bates *v.* Boston, &c. R. R. Co.	628 *n.*
Baxter *v.* Bradbury	770
Beatty *v.* Kurtz	794
Beddoe *v.* Wadsworth	763
Beeson *v.* Burton	406
Belden *v.* Carter	668
Berridge *v.* Ward	334
Bird *v.* Higginson	231
Bishop *v.* Howard	420
Bissell *v.* N. Y. Central R. R. Co.	367
Blanchard *v.* Ellis	775
Blaney *v.* Rice	293
Blight *v.* Schenck	684
Blunden *v.* Baugh	43
Board *v.* Board	72
Booth *v.* Starr	601
Borst *v.* Empie	557
Bowen *v.* Conner	553
—— *v.* Guild	86
Bowman *v.* Farmer	292
Boyd *v.* Slayback	735
Bradley *v.* Rice	310
Bradshaw *v.* Eyre	465
Buck *v.* Squiers	345
Bunce *v.* Wolcott	104
Bush *v.* Cooper	780
Butterworth *v.* Crawford	584
Carbrey *v.* Willis	573
Carter, Doe *d.*, *v.* Barnard	111
Catlin *v.* Ware	621
Champlin *v.* Pendleton	342
Christmas, Doe *d.*, *v.* Oliver	739
Cincinnati *v.* White	799
Clark *v.* Cogge	467
—— *v.* Swift	611
—— *v.* Wheelock	456
Clarke, Doe *d.*, *v.* Smaridge	428
Clayton *v.* Blakey	417
Cole *v.* Kimball	615
Conway *v.* Starkweather	448
Cook *v.* Brown	709
—— *v.* McClure	31
Cox *v.* Bent	421
—— *v.* Freedley	361
Cross *v.* Lewis	131
Curtis *v.* Galvin	455
—— *v.* Gardner	548
Cuthbertson *v.* Irving	747
Daniel *v.* North	129
Deerfield *v.* Arms	22
Degory & Roe's Case	634
Derry Bank *v.* Webster	723
Dodd *v.* Acklom	250
—— *v.* Burchell	498
—— *v.* Witt	380
Doe *d.* Bastow *v.* Cox	432
—— *d.* Carter *v.* Barnard	111
—— *d.* Christmas *v.* Oliver	739
—— *d.* Clarke *v.* Smaridge	428
—— *d.* Garnons *v.* Knight	646

	Page
Doe *d.* Goody *v.* Carter	109
—— *d.* Graves *v.* Wells	70
—— *d.* Littledale *v.* Smeddle	399
—— *d.* Murrell *v.* Milward	248
—— *d.* Parker *v.* Gregory	68
—— *d.* Rigge *v.* Bell	416
—— *d.* Scarter *v.* Hull	60
—— *d.* Tatt *v.* Stratton	421
—— *d.* Thomson *v.* Amey	426
—— *d.* Tomes *v.* Chamberlaine	425
Ellis *v.* Paige	441
Emerson *v.* Mooney	579
Emery *v.* Fowler	205
Espley *v.* Wilkes	518
Exton *v.* Scott	654
Fanning *v.* Willcox	113
Fisher *v.* Hall	728
—— *v.* Smith	360
Foster *v.* Mansfield	675
—— *v.* Wright	17
French *v.* Pearce	76
Garnons, Doe *d.*, *v.* Knight	646
Gilford *v.* Yarborough	9
Goody, Doe *d.*, *v.* Carter	109
Graves, Doe *d.*, *v.* Wells	70
Greenby *v.* Wilcocks	598
Grube *v.* Wells	82
Gudgen *v.* Besset	657
Hall *v.* Eaton	305
—— *v.* Harris	681
Halsey *v.* McCormick	327
Hamerton *v.* Stead	246
Hawksland *v.* Gatchel	635
Hughes *v.* Graves	49
Hull & Selby R., Matter of	15
Hyatt *v.* Griffiths	433
Ive *v.* Sams	241
Jackson *v.* Bradford	758
—— *d.* Lamey *v.* Flapps	671
—— *d.* Gilliland *v.* Woodruff	88
—— *d.* Gooch *v.* Wood	243
—— *d.* Hasbrouck *v.* Vermilyea	91
—— *d.* Livingston *v.* Bryan	437
Johnson *v.* Baker	640
—— *v.* Jordan	544
Jones *v.* Swayze	752
Kay *v.* Oxley	522
Kent *v.* Waite	558
Kimball *v.* Blaisdell	761
King *v.* Jones	595
King, The, *v.* Leake	788
Kingdon *v.* Nottle	592, 596
King's County Ins. Co. *v.* Stevens	576
Knowles *v.* Toothaker	297
Lamb *v.* Crosland	198
Lampman *v.* Milks	565
Lehigh Valley R. R. Co. *v.* McFarlan	213
Leigh *v.* Jack	336
Leonard *v.* White	282
Lerned *v.* Morrill	290
Lewes *v.* Ridge	590
Lewis *v.* Rees	389
Littledale, Doe *d.*, *v.* Smeddle	399
Livett *v.* Wilson	133
Lowell *v.* Robinson	312
Luce *v.* Carley	324
Lucy *v.* Levington	591
Lyon *v.* Reed	254
McNeely *v.* Langan	124
Magennis *v.* MacCullogh	242
Makepeace *v.* Bancroft	287
Maynard *v.* Maynard	669
Melvin *v.* Whiting	184, 186
Mercer *v.* Woodgate	790
Merrills *v.* Swift	677
Middlemore *v.* Goodale	590
Miles *v.* Barrows	302
Miller *v.* Hepburn	26
Mitchell *v.* Ryan	691
Mollett *v.* Brayne	244
Moore *v.* Hazelton	706
Morgan *v.* Morgan	402
Morris *v.* Edgington	471
Mullen *v.* Stricker	577
Murrell, Doe *d.*, *v.* Milward	248
National Provincial Bank *v.* Jackson	627 *n.*
Newhall *v.* Wheeler	396
Nicholas *v.* Chamberlain	466
Nichols *v.* Luce	541
Nickells *v.* Atherstone	264
Noke *v.* Awder	736
Overfield *v.* Christie	117

	Page
Packer *v.* Welsted	467
Paine *v.* Woods	329
Palmer *v.* Fletcher	468
Parker, Doe *d.*, *v.* Gregory	68
—— *v.* Foote	187
—— *d.* Walker *v.* Constable	412
Paul *v.* Carver	356
Pernam *v.* Wead	285
Pinnington *v.* Galland	482
Potts *v.* Gilbert	115
Pyer *v.* Carter	488
Reed *v.* Northfield	808
Reimer *v.* Stuber	198
Richards *v.* Rose	485
Richardson *v.* Gifford	422
—— *v.* Langridge	417
Rigge, Doe *d.*, *v.* Bell	416
Right *d.* Flower *v.* Darby	413
—— *d.* Jefferys *v.* Bucknell	741
Robbins, *In re*	382
Roe *d.* Jordan *v.* Ward	414
Rosse's Case	406
Ruggles *v.* Lawson	673
Sacheverel *v.* Frogate	469
Sandilands, *In re*	626 *n.*
Saundeys *v.* Oliff	465
Sawyer *v.* Kendall	121
Say and Seal's Case	620
Schieffelin *v.* Carpenter	267
School District *v.* Benson	38
Sibley *v.* Holden	340
Simpson *v.* Downing	94
Slater *v.* Rawson	767
Sleeper *v.* Laconia	333
Smith *v.* South Royalton Bank	698
Solomon *v.* Vintners' Company	135
Somerset *v.* Fogwell	230
Somes *v.* Skinner	752
Souter, Doe *d.*, *v.* Hull	60
Starr *v.* Child	315
State *v.* Bradbury	810
Steffens *v.* Earl	457
Stokes *v.* Berry	37
Sturgeon *v.* Wingfield	744
Suffield *v.* Brown	52
Sumner *v.* Stevens	81
T. *v.* K.	633 *n.*
Taylor *d.* Atkyns *v.* Horde	47
Thayer *v.* Payne	549
Thetford, Mayor, &c. of, *v.* Tyler	429
Thomas *v.* Cook	244
Thompson *v.* Leach	688
Thomson, Doe *d.*, *v.* Amey	426
—— *v.* Waterlow	569
Tilt, Doe *d.*, *v.* Stratton	421
Tomes, Doe *d.*, *v.* Chamberlaine	425
Tracy *v.* Atherton	202
Tress *v.* Savage	435
Trull *v.* Eastman	773
Watkins *v.* Nash	660
Watts *v.* Kelson	513
Wead *v.* Larkin	783
Webb *v.* Bird	140
Welch *v.* Sackett	714
Wells *v.* Prince	76
Wheeldon *v.* Burrows	529
Wheelwright *v.* Wheelwright	663
White *v.* Bass	494
—— *v.* Godfrey	372
—— *v.* Williams	300
White's Bank *v.* Nichols	373
Whitley *v.* Gough	241
Whyddon's Case	635
Wickham *v.* Hawker	478
Winthrop *v.* Benson	38
—— *v.* Fairbanks	562
Withy *v.* Mumford	607
Worthington *v.* Gimson	491
Y. B. 10 Hen. VI. 25.	633 *n.*

TABLE OF STATUTES.

	Page
3 Edw. I. *c.* 39 (1275), Limitation	34
32 Hen. VIII. *c.* 2, §§ 1–6 (1540), Limitation	34
21 Jac. I. *c.* 16, §§ 1, 2 (1623), Limitation	36
29 Car. II. *c.* 3, §§ 1–3 (1676), Statute of Frauds	229
3 & 4 Wm. IV. *c.* 27, §§ 2, 7 (1833), Limitation	109 *n.*

SELECT CASES

AND OTHER

AUTHORITIES ON THE LAW OF PROPERTY.

BOOK VI.

ACQUISITION OF REAL ESTATE INTER VIVOS.

CHAPTER I.

ORIGINAL ACQUISITION.

Bracton, Lib. II., c. 2, fol. 9 a. Also whatever a river has added to your land by alluvion belongs to you *jure gentium*. But alluvion is a latent increase; and that is said to be added by alluvion, which is so gradually added that you cannot perceive at what moment of time it is added. For although you keep your eyes fixed on it a whole day, the infirmity of sight cannot appreciate such subtle increments; as may be seen in a gourd and the like. But if the increase is not latent but apparent, it will be otherwise. As, for instance, the force of a stream has broken away some part of your farm, and carried it to your neighbor's farm, it is certain that it continues yours; and if, for a considerable time, it remains attached to your neighbor's land, and the trees which it has carried with it have struck their roots into that land, from that time they are regarded as gained for the neighbor's land. Nevertheless the first owner will have a *utilis vindicatio*, according to some: but the *rei vindicatio* is at an end, because it has become parcel of another's land, and the tree is to be called another's, by its nourishment from another land.

The same kind of accession takes place in an island rising in a river, which, if it occupies the middle of the river, is common to those who on each side of the river have farms on the bank, in proportion to the width on the bank of any farm; but if it is nearer to one side, it belongs to those only who on that side have farms on the bank. But if an island rises in the sea, which seldom happens, it belongs to the occupier. Yet do not suppose that the private land of any one,

reduced into the shape of an island, is an island; as, for instance, a river is divided up stream and surrounds a man's land, and again unites below; in this case the land will be his, whose it was before. Care also must be taken in measuring the distance of islands, because one may be easily deceived in this. Therefore let a point be fixed in the middle between the two lands, and according as the island is on one side of the point, it will belong solely to the one, or solely to the other. But if it is at the same time on one side of the point, and on the point itself, and also on the other side, then it will be undivided and in common, so that only so much of the island will come to me, as is contained between the middle of the point and my land; and so it shall be done in my neighbor's case as regards division. And it seems that the nearness and distance of the island ought to be considered according to the beginning of its rise, and hence it will result, that if between the island which is nearer to me, and my neighbor's opposite bank, on the other side of the river, another island rises, the measure will be taken from my island, and not from my land. And all these things are to be held in the case of an island which is attached to the bed of the river, and is not supported by bushes. But if a round island is found, it will be difficult to measure it; yet this should be observed, that everything which is nearer belongs to me, and so what is nearer to my neighbor belongs to him: and this will never fail. Now this happens as to lands not bounded [*in agris non limitatis*], for in bounded lands the law of allavion has no place. But lands are bounded which are assigned to any persons in fixed places and by fixed limits, where it is known what is given to any one, and what is retained and left. Besides, an island does not belong to bounded lands, by reason of its nearness in a public river, but it belongs to the occupier, and consequently to the king on account of his prerogative. The same kind of accession takes place in the bed of a river which has been left by the river. For it belongs to those who own farms on the bank of the river, in proportion, that is, to the width of each one's land on the bank. But the new bed comes at once under the same law as the river, that is, it is public. For a river, by making a bed for itself, turns private land into public, and public land into private. And so rivers are said to perform the duties of surveyors, that is of judges or princes. For a judge or an emperor often adjudges to one what belongs to another, justly or unjustly, in good faith or bad. But when a river has taken away my farm from me by making a channel, and then returns to its old bed, in strict right I can recover nothing of my said farm: for it belongs to those, who have farms on the bank; nevertheless in equity, this hardly obtains, that is, it does not obtain at all. But where the river has not formed a bed for itself in my land, but has overflowed it, the species of the land is not changed as regards ownership.[1]

Hale, De Jure Maris (in Hargrave's Law Tracts), 5, 6. If a fresh river between the lands of two lords or owners do insensibly gain on

[1] See Inst. ii. 1, 20-24; Dig. xli. 1, 7 (1-6), 12, 16, 29, 30, 45, 56, 65.

one or the other side; it is held, 22 Ass. 93, that the propriety continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds. As if the river running between the lands of A and B, leaves his course, and sensibly makes his channel entirely in the lands of A, the whole river belongs to A: *aqua cedit solo;* and so it is, though if the alteration be by insensible degrees, but there be other known boundaries as stakes or extent of land, 22 Ass., pl. 93. And though the book make a question, whether it hold the same law in the case of the sea or the arms of it, yet certainly the law will be all one, as we shall have occasion to show in the ensuing discourse.

But yet special custom may alter the case in great rivers. For instance, the river of Severn, which is a wild river, yet, by the common custom used below Gloucester bridge, it is the common boundary of the manors of either side, what course soever the river takes; viz. the *filum aquæ* is the common mark or boundary, though it borrow great quantities of land, sometimes of one side, sometimes of the other, and gives them to the opposite shore.

HALE, DE JURE MARIS, 14–17. The king hath a title to *maritima incrementa*, or increase of land by the sea; and this is of three kinds; viz. 1. Increase *per projectionem vel alluvionem*. 2. Increase *per relictionem vel desertionem*. 3. *Per insulæ productionem*.

1. The increase *per alluvionem* is, when the sea by casting up sand and earth doth by degrees increase the land, and shut itself out farther than the ancient bounds went; and this is usual. The reason why this belongs to the Crown is, because in truth the soil, where there is now dry land, was formerly part of the very *fundus maris*, and consequently belonged to the king. But indeed if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *idem est non esse et non apparere;* the land thus increased belongs as a perquisite to the owner of the land adjacent.

2. The increase *per relictionem*, or recess of the sea. This doth *de jure communi* belong to the king; for as the sea is parcel of the waste or demesne, so of necessity the land that lies under it, and therefore it belongs to the king when left by the sea; and so also it regularly holds in lands deserted by a river, that is, an arm of the sea or a creek of the sea *primâ facie*, especially if the creek or river be part of a port. Claus. 10 E. 3, m. 18. Upon an inquisition finding that half an acre in the suburbs of Canterbury "crevit in cursu ripæ Cantuariæ per alluvionem et diluvionem dictæ ripæ," this half acre was seised into the king's hands. But it is true, it was afterwards restored to the Abbot of St. Austin's; because by another inquisition it was found, "Quod non est solum nostrum, nec accrevit per alluvionem et diluvionem dictæ ripæ, sed extitit solum abbatis, &c. a tempore cujus memoria, &c. *Cur primi*, upon an information against Oldsworth and others for that which is now called Sutton Marsh, that three hundred acres of land was *relictum per mare*, and that the defendants had intruded into it:

the defendants pleaded specially, and entitled themselves by prescription to the lands project by the sea; and upon a demurrer adjudged against them, — that 1st, by the prescription or title made to lands project, which is *jus alluvionis*, no answer is given to the title of information for lands relict, for these were of several natures, — 2d, it was held, that it lies not in prescription to claim lands relict *per mare*; for so if the channel between us and France should dry up, a man might prescribe for it, which is unreasonable; for "Nihil prescribitur nisi quod possidetur."

But this hath some exceptions, besides these that follow in the ensuing chapter.

If a subject hath had by prescription the property of a certain tract, or creek, or navigable river, or arm of the sea, even while it is covered with water, by certain known metes or extents; this, though it should be relicted, the subject will have the propriety in the soil relicted. For he had it before, though covered with water; and although the sea is a fluid thing, yet the *terra* or *solum subjectum* is fixed; and by force of a clear and evident usage a subject may have the propriety of a private river: though the acquest of the former be more difficult, and requires a very good evidence to make it out, as shall be said in the ensuing chapter.

If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it: or though the marks be defaced: yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety: and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years.

If the mark remain or continue, or extent can reasonably be certain, the case is clear. *Vide* Dy. 326; 22 Ass. 93. See for this a notable case in the case of an overflowing by the Thames, which is an arm of the sea. *Rot. Parliamenti* 8 E. 2, *m.* 23, *pro Willielmo Burnello.* Philip Burnell, father of William, being seised of the manor of Hacchesham near Greenwich, died his heir within age during his minority. "Aqua Thamisiæ magnam partem terræ et prati manerii prædicti ac aliarum terrarum contiguarum superundavit." The Bishop of Bath and Wells, by agreement with the king, was to stop the breach at his own charges, and was to hold the land for seven years to reimburse his charges. This he did, and the land was regained, and the bishop held the land for his seven years, and three years over them. Burnell desired relief for his land in Parliament against the bishop. The answer was, "Sequatur versus episcopum ad communem legem." — which would not have been, if the king had been intituled by the inundation.

P. 18, E. 2, *Rot.* 173 B. R., upon the like account a considerable quantity of marsh ground, containing one hundred acres, parcel of the

manor of Stebunhith, was regained from the Thames, and enjoyed accordingly. I think it is the same that is now called Stepney Marsh, or at least some part of the manor now built upon and contiguous to the Thames. The record is worth the reading, but long.

Claus. 18 H. 3, *m.* 21, *pro Villata de Shinberg* in Gloucestershire.

"Rex Vicecomiti, &c. Quia accepimus per inquisitionem, quam fieri precipimus, quod illa pars terræ, quam utraque villata de Shinbridge et Aure sibi vendicant, eo quod aqua Sabrinæ eam occupavit super campum de Shinberge versus campum de Aure, et postea processu temporis eam rejecit ad campum de Shinberge, antequam sic rejecta esset per aquam Sabrinæ; de jure pertinuit ad villam de Shinbridge, et in parte fuit terra arabilis, et in parte pastura, ad eandem villam de Shinbridge pertinens per divisam fossati, quod vocatur Hedgewood: precipimus tibi, quod eidem villatæ de Shinberge plenam seisinam de prædicta parte terræ habere facias. Teste Rege apud Gloucesteriam."

The river of Severn had gained upon Shinbridge so much, that its channel ran over part of Shinbridge lands, and lost part thereof unto the other side, and then threw it back again to Shinberge. It shall not belong to Aure. Neither was it at all claimed by the king, though Severn in that place be an arm of the sea. But it was restored to Shinberge as before.

But the truth is, that there the *maritima incrementa* of that river belong to the barons of Barclay, as shall be shown. Yet the property of the soil was not lost to the owners that had it before.

And the truth is also, that river, which is a wild, unruly river, and many times shifts its channel, especially in that flat between Shinberge and Aure, is the common boundary between the manors of either side, viz. the *filum aquæ*, or middle of the stream. And this is the custom of the manors contiguous to that river from Gloucester down to Aure, which was not taken notice of in that record. Yet it serves for this purpose to show, that the king gained not the propriety against the town by such inundation.

It is true, here were the old bounds or marks continuing, viz. the Hedgewood. But suppose the inundation of the sea deface the marks and boundaries, yet if the certain extent or contents from the land not overflown can be evidenced, though the bounds be defaced, yet it shall be returned to the owner, according to those quantities and extents that it formerly had. Only if any man be at the charge of inning of it, it seems by a decree of Sewers he may hold it till he be reimbursed his charges, as was done in the case of Burnell before alleged. But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was: for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues.

3. The third sort of maritime increase are islands arising *de novo*

in the king's seas, or the king's arms thereof. These upon the same account and reason *primâ facie* and of common right belong to the king: for they are part of that soil of the sea that belonged before in point of propriety to the king: for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water: and thus some places have arisen, and their original recorded, as about Ravensend in Yorkshire.

And thus much of the king's right of propriety which he hath in the sea, and also *primâ facie* and in common presumption in the ports and creeks and arms of the sea.

Hale, De Jure Maris, 28-31. Let us now come to the *maritima incrementa*, viz.: *Alluvio maris; Recessus maris; et Insulæ maris.*

1st. For the *jus alluvionis*, which is an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees. Bracton, lib. 2, cap. 2, writes thus: "Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum. Et per alluvionem adjici dicitur, quod ita paulatim adjicitur, quod intelligere non possis quo momento temporis adjiciatur, &c. Si autem non sit latens incrementum, contrarium erit, ut vis fluminis partem aliquam ex tuo prædio detraxit, et vicini prædio appulit, certum est eam tuum permanere, &c." But Bracton follows the civil law in this and some other following places. And yet even according to this, the common law doth regularly hold at this day between party and party. But it is doubted in case of an arm of the sea. 22 Ass. 93.

This *jus alluvionis*, as I have before said, is *de jure communi* by the law of England the king's, viz. if by any marks or measures it can be known what is so gained: for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*, as well in maritime increases as in the increases by inland rivers.

But yet custom may in this case give this *jus alluvionis* to the land whereunto it accrues.

This is made out very plainly by these ensuing records.

Communia Trin. 43 E. 3, *Rot.* 13, *in Scaccario*, which is that very record which is cited by Dyer, 326, out of the book of Ramsey. — Process went out against the Abbot of Ramsey "ad ostendendam causam, quare 60 acræ marisci in manum regis non debent seisiri, quas abbas appropriavit sibi et domui suæ sine licentia regis, super quadam generali commissione de terris a rege concelatis et detentis. Abbas respondit, quod ipse tenet manerium de Brancaster, quod situatum est juxta mare, et quod est ibidem quidam mariscus, qui aliquando per influxus maris minoratur, aliquando per defluxus maris augetur, absque hoc quod appropriavit sibi prout per præsentationem prædictam supponitur." And issue joined and verdict given for the abbot by Nisi

Prius before one of the barons. "Et judicium quod eat sine die, salvo semper jure regis."

Though there were a verdict upon the issue, whether *appropriavit* or not, yet it is plain, that the title stood upon that which the abbot alleged by way of increment. And note, here is no custom at all alleged; but it seems he relied upon the common right of his case, as that he suffered the loss so he should enjoy the benefit, even by the bare common law in case of alluvion.

M. 23, E. 3, B. R. *Rot.* 26, *Lincolnia*. — The Abbot of Peterborough was questioned at the king's suit for acquiring 30 "acras marisci in Gosberkile, licentia regis non obtenta." The abbot pleaded, "quod per consuetudinem patriæ est et a tempore quo, &c. extitit usurpatum, quod omnes et singuli domini, maneria terras seu tenementa super costeram maris habentes, particulariter habebunt marettum et sabulonem per fluxus et refluxus maris secundum majus et minus prope tenementa sua projecta. Et dicit, quod ipse habet quoddam manerium in eadem villa, unde plures terræ sunt adjacentes costeræ maris, et sic habet per fluxus et refluxus maris circiter 300 acras maretti terras suas adjacentes, et per temporis incrementum secundum patriæ consuetudinem; et absque hoc quod ipse perquisivit, &c." And upon issue joined, it depended many years before the issue was tried. But afterwards, P. 41, E. 3, B. R. *Rot.* 28, *Lincolnia*, *Rex*, viz. given, "quod, secundum consuetudinem patriæ, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costeræ maris adjacentes projecta, &c. Ideo abbas sine die."

Observe, 1st. Here is custom laid, and he relies not barely upon the case without it.

2d. In this case it was *per incrementum temporis* and *per mare projecta*. It is not a sudden reliction or *recessus maris*, as I shall have occasion to mention hereafter. And though there is no *alluvio* without some kind of reliction, for the sea shuts out itself; yet the denomination is taken from that which predominates. It is an acquest *per projectionem* or *alluvionem*, not *per recessum* or *relictionem*.

3d. That such an acquisition lies in custom and prescription; and it hath a reasonable intendment, because these secret and gradual increases of the land adjoining *cedunt solo tanquam majus principali*; and so by custom it becomes as a perquisite to the land, as it doth in all cases of this nature by the civil law.

2. Now as touching the accession of land *per recessum maris*, or a sudden retreat of the sea, such there have been in many ages. Sometimes the ocean, especially the narrow sea lying between us and France and the Netherlands, leaves the English shore in a great considerable measure; possibly by reason of some superundation on the other eastern shore, or by some other reason we know not.

This accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of *alluvio*, or

increase *per projectionem*; and therefore, if an information of an intrusion be laid for so much land relict *per mare*, it is no good defence against the king to make title *per consuetudinem patriæ* to the *maretum*, or *sabulonem per mare projectum*; for it is an acquest of another nature. And this was accordingly adjudged, H. 12, Car. *Rot.* 48, in the case of the *King* against *Oldsworth and Others for Sutton Marsh, in Sussexia*. And in that case it was likewise held and adjudged, that lands acquired *per relictionem maris* are not prescribable, as part of a manor or as belonging to the subject; for that were to prescribe, in effect, that the narrow seas to the coasts of France or Denmark were part of a manor. In that case the information, plea, and judgment were in substance as followeth, viz.: —

"Quod cum 7000 acræ marisci salsi vocati Sutton Marsh, jacentes et existentes juxta Sutton Long in comitatu prædicto, videlicet, inter Sutton Long et mare ad refluxum ejusdem, fuissent parcella littoris marini, ac ad refluxus maris naturalis et ordinarios aquis salsis et marinis inundatæ; eumque eadem 7000 acræ marisci salsi nuper a mari, unde inundatos fuissent, fuissent relictæ." Then the information sets forth a grant by King James under the great seal to Peter Ashton and others, and a re-grant by them by deed enrolled to the king, and that Michael Oldsworth, &c. intruded. The defendant Oldsworth came in: and as to part pleaded as tenant, viz. "Quod bene et verum est, quod prædictæ 7000 acræ marisci salsi vocati Sutton Marsh, jacentes et existentes juxta Sutton Long, viz. inter Sutton Long et mare ad refluxum ejusdem, fuerunt parcella littoris marini, et ad refluxus maris naturales et ordinarios aquis salsis inundatæ et a mari relictæ prout per informationem." But he further saith, the king was seised in right of the duchy of the manor of Sutton, "et quod plures terræ dicti manerii ante relictionem dictæ costeræ maris adjacebant: et quod consuetudo patriæ est et a tempore quo, &c. quod domini maneriorum, terrarum, seu tenementorum super costeram maris adjacentium, particulariter habebunt maretum et sabulonem per fluxum et refluxum maris secundum majus et minus prope terras seu tenementa sua projectum sive relictum: quodque et prædictæ 7000 acræ marisci salsi ad terram prædictam parcellam manerii de Sutton adjacent, et per fluxus et refluxus maris relictæ fuerunt a mari, et projectæ ad terram prædictam parcellam manerii de Sutton prædicti, ratione cujus relictionis prædictæ dominus rex fuit seisitus, &c. de prædictis 7000 acris in jure ducatus, &c." And then he entitles himself by a grant under the duchy seal, and traverseth what he had not confessed. Upon this there was a demurrer and judgment for the king, upon solemn argument: and principally upon this reason, that custom cannot entitle the subject to relicted lands, or make it part of a manor: and it differed from the *Case of the Abbot of Peterborough* before cited: for there it was only *project*, but here *relict* is added to the plea, that it might answer the information: though the plea in the *Abbot of Peterborough's Case* was the precedent by which the plea was drawn, and with which it agreed, saving that addition of *relict*.

And yet the true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's, because the water hath left it. But in the case of *alluvio maris*, it is otherwise; because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land; and therefore, in case of private rivers, it seems by the very course of the common law such a gradual increase *cedit solo adjacenti*; and though it may be doubtful whether it be so *ex jure communi* in case of the king, yet doubtless it gives a reasonableness and facility for such right of *alluvio* to be acquired by custom; for though in every acquest *per alluvionem* there be a reliction or rather exclusion of the sea, yet it is not a recess of the sea, nor properly a reliction.

But this is to be carried along with us in the case of *recessus* or *relictio maris vel brachii ejusdem;* that where the land, as it stood covered with water, did by particular usage or prescription belong to a subject, there the *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris vel brachii ejusdem* belongs to the same subject.

GIFFORD *v.* YARBOROUGH.

House of Lords. 1828.

[*Reported* 5 *Bing.* 163.]

Best, C. J.[1] My Lords, the question which your Lordships have proposed for the opinion of the Judges is as follows: "A. is seised in his demesne as of fee of the manor of N., and of the demesne lands thereof, which said demesne lands were formerly bounded on one side by the sea. A certain piece of land, consisting of about 450 acres, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and imperceptibly, and by imperceptible increase in long time cast up, deposited, and settled by and from flux and reflux of the tide, and waves of the sea in, upon, and against the outside and extremity of the said demesne lands hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, grown, and accrued as aforesaid, belong to the Crown or to A., the owner of the said demesne lands? There is no local custom on the subject."

[1] In this report in Bingham, only the opinions of the Judges and of the Law Lords are given. *Sub nom. The King* v. *Yarborough*, the case is fully reported in the King's Bench, 3 B. & C. 91; and in the House of Lords, 2 Bligh, N. S. 147.

The Judges have desired me to say to your Lordships that land gradually and imperceptibly added to the demesne lands of a manor, as stated in the introduction to your Lordships' question, does not belong to the Crown, but to the owner of the demesne land.

All the writers on the law of England agree in this: that as the king is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

But this right of the sovereign might, in particular places, or, under circumstances, in all places near the sea, be transferred to certain of his subjects by law. A law giving such rights may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial. Such as claim under the former must plead it and establish their pleas by proof of the existence of such a custom from time immemorial.

General customs were in ancient times stated in the pleadings of those who claimed under them; as the custom of merchants, the customs of the realm with reference to innkeepers and carriers, and others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence; they are considered as adopted into the common law, and as such are recognized by the Judges without any evidence. These are called "customs" because they only apply to particular descriptions of persons, and do not affect all the subjects of the realm: but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws; as an Act of Parliament applicable to all merchants, or to the whole body of the clergy, is to be regarded by the Judges as a public Act.

If there is a custom regulating the right of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges as part of the common law. We think there is a custom by which land from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the king. Such a custom is reasonable as regards the rights of the king, and the subjects claiming under it; beneficial to the public; and its existence is established by satisfactory legal evidence.

There is a great difference between land formed by alluvion, and derelict land. Land formed by alluvion must become useful soil by degrees too slow to be perceived: little of what is deposited by one tide will be so permanent as not to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. But the sea frequently retires suddenly, and leaves a large space of land uncovered.

When the authorities relative to these subjects are considered, this difference will be found to make a material distinction in the law that applies to derelict lands, and to such as are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion would be hard enough or sufficiently wide to be used beneficially by any one but the owner of the lands adjoining. As soon as alluvion lands rise above the water, the cattle from the adjoining lands will give them consistency by treading on them; and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide the owner of the adjoining lands may render them productive. Thus lands which are of no use to the king will be useful to the owner of the adjoining lands, and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz. by occupation and improvement.

Locke in a passage in his Treatise on Government, in which he describes the grounds of the exclusive right of property, says: "God and man's reason commanded him to subdue the earth; that is, improve it for the benefit of life, and therein lay out something upon it that was his own, his labor. He that in obedience to that command subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property which another had no title to, nor could without injury take from him."

This passage proves the reasonableness of the custom that assigns lands gained by alluvion to the owner of the lands adjoining.

The reasonableness is further proved by this, that the land so gained is a compensation for the expense of embankment, and for losses which frequently happen from inundation to the owners of lands near the sea.

This custom is beneficial to the public. Much land which would remain for years, perhaps forever, barren, is in consequence of this custom rendered productive as soon as it is formed. Although the sea is gradually and imperceptibly forced back, the land formed by alluvion will become of a size proper for cultivation and use; but in the mean time the owner of the adjoining lands will have acquired a title to it by improving it.

The original deposit constitutes not a tenth part of its value; the other nine tenths are created by the labor of the person who has occupied it; and, in the words of Locke, the fruits of his labor cannot, without injury, be taken from him.

The existence of this custom is established by legal evidence. In Bracton, book 2, cap. 2, there is this passage: "Item, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum; et per alluvionem adjeci dicitur quod ita paulatim adjicitur quod intelligere non possis quo momento temporis adjiciatur. Si autem non sit latens incrementum, contrarium erit."

In a treatise which is published as the work of Lord Hale, treating

of this passage, it is said: "that Bracton follows in this the civil law writers; and yet even according to this the common law doth regularly hold between parties. But it is doubtful in case of an arm of the sea." Hale de Jure Maris, p. 28. It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institute, lib. 2, tit. 1, § 20. But Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs. Lord Hale admits that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why the same question between the Crown and a subject should not be decided by the same rule. Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry the Third, gives great authority to his writings. Lord Hale, in his History of the Common Law (cap. 7), says, that it was much improved in the time of Bracton. This improvement was made by incorporating much of the civil law with the common law.

We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamor raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these and all the Norman customs which followed would not have been sufficient to form a system of law sufficient for the state of society in the times of Henry the Third. Both courts of justice and law writers were obliged to adopt such of the rules of the Digest as were not inconsistent with our principles of jurisprudence. Wherever Bracton got his law from, Lord Chief Baron Parker, in Fortescue, 408, says, "As to the authority of Bracton, to be sure many things are now altered, but there is no color to say it was not law at that time. There are many things that have never been altered, and are now law." The laws must change with the state of things to which they relate; but, according to Chief Baron Parker, the rules to be found in Bracton are good now in all cases to which those rules are applicable. But the authority of Bracton has been confirmed by modern writers and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down is to be found in 2 Rolle's Abr. 170; in Com. Dig., tit. Prerogative (D. 61); in Callis (Broderip's edition), p. 51; and in 2 Bl. Com. 261.

In the *Case of the Abbot of Peterborough*, Hale de Jure Maris, p. 29, it was holden: "Quod, secundum consuetudinem patriæ, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costeræ maris adjacentes projecta." In the treatise of Lord Hale it is said, "Here is custom laid, and he relies not barely on the case without it." But it is a general, and not a local custom, applicable to all lands near the sea, and not to lands within any particular district. The pleadings do not state the lands to be within any district, and such

a statement would have been necessary if the custom pleaded were local. The *consuetudo patriæ* means the custom of all parts of the country to which it can be applied; that is, in the present case, all such parts as adjoin the sea.

The case of *The King* v. *Oldsworth*, Hale de Jure Maris, p. 14, confirms that of the *Abbot of Peterborough* as to the right of the owner of the adjoining lands to such lands as were "secundum majus et minus prope tenementa sua projecta" (p. 29). That case was decided against the owner, because he also claimed derelict lands against the Crown.

Here it will be observed that there is a distinction made between lands derelict and lands formed by alluvion; which distinction, I think, is founded on the principle that I have ventured to lay down, namely, that alluvion must be gradual and imperceptible; but the dereliction of land by the sea is frequently sudden, leaving at once large tracts of its bottom uncovered, dry, and fit for the ordinary purposes for which land is used. But still what was decided in this case is directly applicable to the question proposed to us. The Judges are, therefore, warranted by justice, by public policy, by the opinions of learned writers, and the authority of decided cases, in giving to your Lordships' question the answer which they have directed me to give.

My Lords, the answer to your Lordships' question is the unanimous opinion of all the Judges who heard the arguments at your Lordships' bar. For the reasons given in support of that opinion I alone am responsible. Most of my learned brothers were obliged to leave town for their respective circuits before I could write what I have now read to your Lordships. I should have spared your Lordships some trouble if I had had time to compress my thoughts; but I am now in the midst of a very heavy Nisi Prius sittings, and am obliged to take from the hours necessary for repose the time that I have employed in preparing this opinion. If it wants that clearness of expression which is proper for an opinion to be delivered by a Judge to this House, I hope that your Lordships will consider what I have stated as a sufficient apology for this defect.

The Lord Chancellor. My Lords, I beg to express my thanks to the learned Chief Justice, and to the Judges, for the attention they have paid to this subject; and I have only to add that I entirely concur in the conclusion at which they have arrived; and I would recommend to your Lordships, as a necessary consequence of the opinion which has been expressed, that the judgment of the Court of King's Bench upon the matter should be affirmed.

Earl of Eldon. My Lords, I heard only part of the argument, and therefore I have some difficulty in stating my opinion in this case; but having had my attention called to subjects of the same nature on former occasions, it does appear to me, I confess, after reading the finding of the jury, that the opinion of the Judges must be that which

the learned Chief Justice has now expressed. I therefore concur in the opinion the Lord Chief Justice has expressed.

Judgment affirmed.[1]

[1] In *Attorney-General* v. *Chambers*, 4 De G. & J. 55, 67–69 (1859), LORD CHELMSFORD said: "There is nothing, however, in any of the cases, or in the few text writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to determine whether there is any ground for this distinction, it is essential to discover, if possible, the principle upon which the right to *maritima crementa* depends.

"The law is stated very succinctly by Blackstone, vol. 2, p. 262, in these words: 'As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex;* and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss; but if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king, for as the king is lord of the sea, and as owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.'

"I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson, in the case of *The Hull and Selby Railway Company*, 5 M. & W. 327, viz., 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle' as to gradual accretion 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighboring lands of another proprietor. Whatever may be the nature and character of these operations, they ought not to affect a rule which applies to a result and not to the manner of its production.

"Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the sea-shore, however difficult such proof of intention may be."

And it was held in *Lovingston* v. *St. Clair County*, 64 Ill. 56 (1872), affirmed 23 Wall. 46, that title to land, made gradually by alluvion, passed to the riparian owner, although the accretion was aided by artificial structures on the land of other persons.

MATTER OF THE HULL AND SELBY RAILWAY.

EXCHEQUER OF PLEAS. 1839.

[*Reported* 5 *M. & W.* 327.]

By an order made on the equity side of the Exchequer, the following case was stated for the opinion of this court: —

On the northern side of the River Humber (which river is an arm of the sea) there is an ancient artificial embankment, which was erected many centuries ago for the protection of the lands on the north of the embankment from the encroachments of the river at extraordinary high tides.

Between this ancient embankment and the foreshore of the river, there were in former times certain pieces of pasture land called Growths, extending from Lime-kiln Creek on the east to Gallow Creek on the west; which Growths were the property of the ancestors of Henry Broadley, Esq., in whom the rights and interests of such ancestors, in respect of such Growths, are now vested. The foreshore of the river, or the land lying between high and low water-marks at the ordinary tides, is the property of the Crown. The tides of the Humber have, in the progress of years, encroached upon and washed away the whole of the Growths, except two portions thereof at each extremity (which have of late years been protected by embankments from further encroachments); so that it is now, and has been for many years past, impossible to distinguish the part of the Growths so washed away from the mud and soil of the foreshore of the river. The river at the neap tides now overflows, and has for many years past overflowed, at high water, the parts of the Growths so washed away; but they are uncovered by the river at low water.

The encroachment of the tides has been by slow and imperceptible progress, so that no particular period thereof can be ascertained; but, within living memory, there has been a much greater portion of the Growths unwashed away than there is at present.

In the month of June, 1836, an Act of Parliament was passed for making a railway from Kingston-upon-Hull to Selby.

The Railway Company constituted by this Act have, under the provisions thereof, taken for the formation of the railway a portion of the Growth so washed away as aforesaid, and have protected the same from the tides of the river, and the Company have paid the money, assessed by a jury for the taking of such portion, into the Court of Exchequer.

The questions for the opinion of this court are —

1st, Whether, at the time of the passing of the Act, the Crown or the said Henry Broadley was entitled to the lands taken by the Railway Company.

2dly. Whether the Crown, or the said Henry Broadley, is entitled to the money paid by the Company into the Court of Exchequer.

The *Solicitor-General*, for the Crown.

Sir F. Pollock, contra.

Lord Abinger, C. B. This case appears to me to be free from difficulty. If the Crown cannot adduce the authority of many decided cases in support of its claim, it is because in principle no doubt could be entertained upon it. It is admitted, that as between subject and subject, the law as to gradual accretion is settled by the cause of *Rex* v. *Lord Yarborough* [3 B. & Cr. 91 ; s. c. in Dom. Proc., 2 Bligh, N. S. 147 ; 1 Dow, N. S. 178 ; 5 Bing. 163]. The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law, for the permanent protection and adjustment of property. It is different, indeed, where the change occurs by a sudden advance or recession of the water. In Scotland, a river containing a valuable salmon fishery belonging to the present Lord Chief Commissioner Adam was suddenly transferred to the land of his neighbor. Afterwards, by another equally violent effort of nature, the river returned to its former channel ; but in neither case did the owner of the bed of the river lose his right to the soil. But in all cases of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added ; and *vice versa*. That is the rule as between subject and subject ; but it is said to be different as between the Crown and subject. But Sir F. Pollock says we all hold by grant from the Crown ; then the Crown holds by the same rights, and with the same limitations as its grantee. This being then the case of a gradual access of the water, it makes the land now between high and low water-mark the property of the Crown. No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property. The money, therefore, must be paid to the Crown.

Alderson, B. I am of the same opinion. I think the question is precisely the same, whether the claim is made as against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore — that is, the space between high and low water-mark — grants the adjoining soil to an individual ; and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible : in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all.

Gurney, B., and Maule, B., concurred.

Judgment for the Crown.

FOSTER *v.* WRIGHT.

COMMON PLEAS DIVISION. 1878.

[*Reported* 4 *C. P. D.* 438.]

MOTION for judgment.[1]

Action to try the right of fishing in part of the River Lune.

The claim alleged that the plaintiff was the owner of the Camp House Farm, abutting on the river, and of the whole bed of the river abutting on the farm; that he also claimed in the alternative a several fishery, and likewise in the alternative a free fishery in that part of the river; that he also claimed the bed of the river and the said rights of fishing as lord of the honor and manor of Hornby, which comprised the river and the bed thereof; and that the defendant had committed divers trespasses by entering upon the bed of the river and fishing therein, and preventing the plaintiff from fishing therein.

The defence alleged (*inter alia*) that the defendant and those whose estate he had, were the owners of the Snabhouse estate, abutting on the river, and that the grievances complained of consisted of acts of fishery and other acts done by the defendant in that part of the river lying between its shore on the Snabhouse estate (opposite the Camp House Farm), and the middle of the bed of the river along the same part of the Snabhouse estate; the defendant denied that the plaintiff was owner or possessed of that part of the bed of the river. Issue.

At the trial before *Brett*, L. J., at the Lancashire Spring Assizes, 1878, it appeared that no facts were substantially disputed except as to a question of boundary, viz., the extent to which the River Lune had encroached upon the land of the defendant. Some encroachment was admitted, and the parties arranged that the question of boundary should thereafter be settled between them, and that the plaintiff should move for judgment upon the facts proved and admitted, of which those material were as follow.

The River Lune, which is neither tidal nor navigable, flows through the manor or honor of Hornby, in Yorkshire. From an inquisition *post mortem* taken in the thirteenth year of Edw. I., it appears that one Sir Geoffrey de Neville held the manor with the appurtenances, and that he "also held the fishery of all the waters of Hornby." The manor passed down into the possession of George Earl of Cardigan, who in 1711 enfranchised some land in the township of Grassingham within the manor. This land, called Wood's Ayre, did not then abut on the river.

By the deed of enfranchisement the lord excepted and reserved from the grant of the premises his seigniorial rights and services, tithes and compositions, and also all manner of free warrens. . . . Together also

[1] This report was postponed pending an appeal. The case came before the Court of Appeal during the last sittings, but was there settled by the parties.

with free liberty of hunting, hawking, fishing, and fowling in and upon the premises or any part thereof, at seasonable and convenient times of the year. In 1780 the manor was forfeited on the attainder of its lord, Colonel Charteris, but was re-granted, with free liberty of fishing in all the waters of the manor, and in 1783 came into the hands of Mr. John Marsden. His heir-at-law, after establishing his right to it in the action of *Tatham* v. *Wright*, 2 Russ. & My. 1; 1 A. & E. (Ex. Ch.) 3, sold it, and the purchaser afterwards sold it to the plaintiff, who is now the lord of the manor.

The enfranchised land, Wood's Ayre, in the township of Grassingham, came into possession of the defendant. It is adjacent to the part of the manor lands belonging to the plaintiff and in the township of Tarleton. The boundary of the townships was also the boundary between the two properties.

Prior to 1838 the River Lune flowed wholly within these Tarleton lands of the plaintiff. It ran parallel to the defendant's land, but land belonging to the plaintiff was between the river and the boundary of the defendant's land.

From observations made and noted on a map by a steward of the defendant's predecessor in title, it appeared that between 1838 and June, 1843, the river had by invisible progress moved sideways towards the defendant's land and was wearing away the plaintiff's land which intervened. By November, 1843, it had moved further in the same direction, and it continued to do so until it encroached to some extent upon the land of the defendant, who, in 1853, stopped further encroachment by making an embankment. As a strip of his land now formed part of the river bed, he claimed a right to go upon that part to catch salmon which came there, and in assertion of such right he committed the acts alleged by the plaintiff to be trespasses.

June 24, 1878. *Herschell*, *Q. C.*, and *Crompton*, for the plaintiff, moved for judgment.

C. Russell, *Q. C.*, and *R. S. Wright*, for the defendant.

Cur. adv. vult.

July 3. LINDLEY, J. The plaintiff in this case is lord of the manor of Hornby, and claims the exclusive right to fish in the River Lune between two points where that river is neither tidal nor navigable; and before the enfranchisement hereafter mentioned, the river between those points was locally situate within the manor of Hornby.

This manor formerly belonged to the Crown. In the reign of Edward I. it was granted, with the right to fish in all the waters of the manor; and it remained in private hands for several centuries. In the year 1711 certain lands held of the manor, but not abutting on the river, were enfranchised, and these lands now belong to the defendant. After this enfranchisement the manor became forfeited to the Crown; but it was re-granted, with the free liberty of fishing in all its waters, to the predecessors in title of the plaintiff.

From the earliest times, the lands adjoining the river on both sides of it belonged to the lord; and such was the case both when the defendant's lands were enfranchised, and when the manor was re-granted by the Crown as above mentioned. In other words, until comparatively modern times, the river did not abut on the lands of the defendant. Neither when the defendant's lands were enfranchised, nor when the manor was re-granted out, did any part of the river either abut on or flow through the defendant's lands. Under these circumstances I am unable to see that the deed of enfranchisement has any bearing on the case. That deed reserved to the lord whatever rights of fishing he had in any water flowing through or bounding the lands enfranchised; but it did no more, and at the date of the enfranchisement the Lune was not one of such waters; neither did the re-grant from the Crown confer upon the grantee of the manor any right to fish in the river as distinguished from any other waters of the manor.

The counsel for the defendant suggested that the terms of the new grant did not confer on the grantee any right of fishery, except as incidental to the ownership of the land on the banks and under the river; but it was conceded that as the river was then situate, the grantee from the Crown acquired such ownership; and, in the view which I take of this case, it is not material to determine whether the grantee acquired his exclusive right to fish in the river as an incident to the ownership of the bed of the river, or whether he acquired an exclusive right to fish independently of such ownership.

Since the re-grant of the manor, the course of the river between the points above referred to has gradually changed; its bed has gradually approached nearer and nearer to the defendant's land; and now some portion of that land has become part of the river bed. This part can still be identified, and its boundary can be ascertained. The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property.

I am of opinion that it does. The change of the bed of the river has been gradual; and although the river-bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. Under these circumstances I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner.

Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough*, 3 B. & C. 91; 5 Bing. 163; and, conversely, land gradually encroached upon by water ceases to belong to the former owner: *In re Hull and Selby Ry. Co.*, 5 M. & W. 327. The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history

of the law shows this to be the case. Our own law may be traced back through Blackstone (vol. ii. *c.* 16, pp. 261, 262), Hale (De Jure Maris, *cc.* 1, 6), Britton (book ii. *c.* 2), Fleta (book iii. *c.* 2, §§ 6, &c.), and Bracton (book ii. *c.* 2), to the Institutes of Justinian (Inst. ii. 1, 20), from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine, and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known, was scarcely contested by the counsel for the defendant, and is well settled. See the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost; and passages in Britton (*ubi supra*), in the Year-Books (22 Ass. p. 106, pl. 93), and in Hale, De Jure Maris (book i. *c.* 1, citing 22 Ass. pl. 93), were referred to in support of this view: *Ford* v. *Lacy*, 7 H. & N. 151, was also relied upon in support of this distinction. Britton lays down as a general rule that gradual encroachments of a river inure to the benefit of the owner of the bed of the river; but he qualifies this doctrine by adding, "If certain boundaries are not found." The same qualification is found in 22 Ass. pl. 93, which case is referred to in Hale, *ubi supra*. But, curiously enough, this qualification is omitted by Callis in his statement of the same case: see Callis, p. 51; and on its being brought to the attention of the court in *In re Hull and Selby Ry. Co.*, the court declined to recognize it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenterden's observations in *Rex* v. *Yarborough*, 3 B. & C. 106, are also in accordance with this view; and although Lord Chelmsford in *Attorney-General* v. *Chambers*, 4 De G. & J. 69–71, doubted whether, where the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Ry. Co.*, which decided the point so far as encroachments by the sea are concerned.

Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal or navigable or non-navigable rivers; and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: De Jure Maris, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford* v. *Lacy* the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion; and I do not regard that case as throwing any real light on the question I am considering.

Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river-bed, I am of opinion that the plaintiff has that right; for if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated

by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title.

But, supposing the plaintiff's right of fishing not to have been the consequence of his ownership of the soil, — supposing him to have had only a right to fish in the Lune, — I am of opinion that he has the same right of fishing in the river in its present bed as he had of fishing in the river in its old bed. I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose; nor is there any authority for holding them to be affected thereby. The *Mayor of Carlisle* v. *Graham*, Law Rep. 4 Ex. 361, is no such authority; for in that case the old and the new beds of the river existed as two distinct beds; the new bed was not, as here, formed by the old one gradually shifting its place: then, the water gradually left the old bed, and followed an entirely new course always distinguishable from the old; whilst here, there has been and is only one bed, and its change of place has only become perceptible after the lapse of years. The physical changes are totally different in the two cases.

Whether, therefore, the exclusive right of the plaintiff to fish in the river in question is an incident to his ownership of the soil or is independent thereof, I am of opinion that he is still entitled to such exclusive right in the river as it now exists, and as it will exist if it continues gradually to change its course; and consequently I am of opinion that judgment ought to be entered for the plaintiff.

Lord Coleridge, C. J. I have had the advantage of reading the judgment prepared by my Brother Lindley, and I entirely concur in the result at which he has arrived. Nor should I add anything, but that I am not quite satisfied to base my conclusion so much as he does upon the proposition that the grant of the fishery, in such terms as are used in the two grants in this case, carries with it the right of the soil, and that the soil therefore of the River Lune as it varies gradually from time to time passes irrespective of the *medium filum* to the plaintiff. I do not say that it does not, but I am not satisfied that it does. If the whole soil over which the River Lune flowed passed by the first grant, and, after the death of Colonel Charteris, by the second to the predecessor in title of the plaintiff, I think the consequence as to gradual accretion, which my Brother Lindley draws from that premise, does in legal reasoning follow from it. But I confess I somewhat doubt the premise. The safer ground appears to me to be that the language as to the fishery in both the earlier and the later grants conveys what it expresses, — a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, *i. e.*, as I understand the phrase, a right to take fish *in alieno solo*, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as

the changes of the Lune in this case are proved or admitted to have been.

I agree, for the reasons given by my Brother Lindley, that the case of *Mayor of Carlisle* v. *Graham* is distinguishable from the case before us; and upon these grounds I concur in thinking that our judgment should be for the plaintiff.

Judgment for the plaintiff.

DEERFIELD *v.* ARMS.

Supreme Judicial Court of Massachusetts. 1835.

[*Reported* 17 *Pick.* 41.]

Writ of entry to recover a parcel of land containing about five acres, recently formed by alluvial deposits on the margin and bed of Deerfield River. The land lies and has been formed in a bend of the river curving southerly and easterly from the river. The case was tried before *Shaw*, C. J.

The demandants claimed the land in question as owners of the land on the east bank of the river at the time of the accretion. The tenant claimed to hold it as an accretion to his own land lying higher up on the southerly and easterly side of the bend of the river.

One question, reserved for the opinion of the whole court, was whether the demandants had proved their title to the land on the east bank of the river in virtue of which title alone they could claim the accretion. This depended almost exclusively on the early records of the proprietors of the township of Deerfield, and the town and the parish surveys, grants, and other documents.

The tenant contended, that supposing the demandants' title to the land on the east bank to be established, still it would not entitle them to any part of the alluvial formation, because he maintained that he and those under whom he claimed had been in possession of some part of the alluvial formation for near sixty years; and that as it commenced making on the southwesterly side, it had never reached the east bank of the river, and therefore it could not be said to be an accretion to it. It was testified that between the eastern bank of the river and the alluvial land in controversy, there is a low place into which a small brook falls; and that often there is water in it, but that sometimes it is dry.

If the court should be of opinion that the demandants were entitled to recover any part of the land in controversy, the amount and proportion to which they were entitled was to be determined by an assessor or commissioners, conformably to such rules as the court should establish.

Alvord and *Wells*, for the demandants.

Billings, *R. E. Newcomb*, and *H. G. Newcomb*, for the tenant.

SHAW, C. J., delivered the opinion of the court. There are several points in this cause to which it seems proper to allude in the outset, and upon which we entertain no doubt.

In the first place it seems very clearly settled that, upon all rivers not navigable (and all rivers are to be deemed not navigable above where the sea ebbs and flows), the owner of land adjoining the river is *prima facie* owner of the soil to the central line, or thread of the river, subject to an easement for the public to pass along and over it with boats, rafts, and river craft. This presumption will prevail in all cases, in favor of the riparian proprietor, unless controlled by some express words of description which exclude the bed of the river, and bound the grantee on the bank or margin of the river. In all cases, therefore, where the river itself is used as a boundary, the law will expound the grant as extending *ad filum medium aquæ*.

We also consider it as a well-settled principle of law, resulting in part from the former, that where land is formed by alluvion, in a river not navigable, by slow and imperceptible accretion, it is the property of the owner of the adjoining land, who for convenience, and by a single term, may be called the riparian proprietor. And in applying this principle, it is quite immaterial whether this alluvion forms at or against the shore, so as to cause an extension of the shore or bank of the river, or whether it forms in the bed of the river and becomes an island. And where an island is so formed in the bed of the river as to divide the channel and form partly on each side of the thread of the river, if the land on the opposite sides of the river belong to different proprietors, the island will be divided, according to the original thread of the river, between the rival proprietors.

This view of the subject disposes of one of the questions of fact, in relation to which some evidence was given; namely, whether the alluvial formation in controversy was separated by water from the eastern bank of the river, claimed by the demandants as riparian proprietors, or whether the newly formed land, at that point, extends quite to the eastern bank. We think this fact entirely immaterial to the rights in controversy between these parties.

But by far the most difficult question in this cause, is, whether the demandants have established a title to the land lying on the easterly bank of the river at the place in question, so as to constitute them riparian proprietors, in which character alone they can maintain the claim which they assert in this action. It is true that the title to the land on the easterly side of the river is not claimed by the defendant; still, the demandants must recover by the strength of their own title and not by the weakness of the defendant's, and as the demandants aver that they are seised of this land, and this averment is material to their title, and is traversed and put in issue by the defendant, it is a fact to be proved. As, however, no counter title is set up by the defendant, it is obvious that a *prima facie* title will be sufficient.

[The Chief Justice here went into an examination of the evidence of the demandants' title to the land on the eastern side of the river at the place in question, drawing the conclusion that they were seised of the same. He then proceeded:]

Considering that the town have established their title as riparian proprietors to a certain portion of the alluvial formation in question, it only remains to inquire how it shall be divided. This is a curious, and in many aspects in which it may be presented would be a very difficult, subject, as well as the analogous one of the division of flats, or land bounding on salt water, over which the tide ebbs and flows, among coterminous riparian proprietors, were it necessary to prescribe a general rule applicable to all supposable cases. But I do not think it necessary to discuss this subject at large, because the circumstances of the present case do not require it.

As neither of the riparian proprietors can establish any claim superior to the other, it is manifest that the newly acquired land must be divided equally between the parties, in proportion to the land which they respectively hold as riparian proprietors, and in virtue of which the law attributes to them this acquisition.

The facts of the present case show, and it appears by the plan, which is made part of the case, that the alluvion is formed in a bend of the river, extending along in front of the lands of several different owners.

The object is, to establish a rule of division among these proprietors, which will do justice to each, where no positive rule is prescribed, and where we have no direct judicial decisions to guide us. The case most analogous to the present, which has occurred in this Commonwealth, is that of the division of flats ground, among coterminous proprietors, conformably to the general principle laid down in the Colony ordinance, giving to the proprietors of lands bounding on salt water, where the tide ebbs and flows, propriety to low-water mark, with some qualifications. *Rust* v. *Boston Mill Corp.*, 6 Pick. 158; *Emerson* v. *Taylor*, 9 Greenl. 44. In both cases we think two objects are to be kept in view, in making such an equitable distribution; one is, that the parties shall have an equal share in proportion to their lands, of the area of the newly formed land, regarding it as land useful for the purposes of cultivation or otherwise, in which the value will be in proportion to the quantity; the other is, to secure to each an access to the water, and an equal share of the river line in proportion to his share on the original line of the water, regarding such water line in many situations as principally useful for forming landing-places, docks, quays, and other accommodations with a view to the benefits of navigation, and as such constituting an important ingredient in the value of the land. Without attempting to establish a rule of general application, we think that the one which shall most nearly, in general, accomplish these two conditions, will come nearest to doing justice.

A rule which appears to us to be applicable to the present case and meets the required conditions, is found in a work of the civil law, cited

by the learned counsel who opened the case for the demandants, entitled "A Collection of New Decisions," by Denisart, published in France in 1783. It is in the form of a dictionary, and this subject is discussed under the title, *Attérissement*.

The rule suggested in this work is founded upon the obvious consideration already alluded to, that in many cases lands which border upon navigable rivers derive a great part of their actual value from that circumstance, and from the benefit of the public easement thereby annexed to such lands; and that being wholly deprived of the benefit of that situation would operate as a great hardship and do real injustice to a riparian proprietor, although he should obtain his full proportion of the land measured by the surface. This injustice will be avoided by the proposed rule, in conformity with which each proprietor will take a larger or smaller proportion of the alluvial formation, and of the newly formed river or shore line, according to the extent of his original line on the shore of the river.

The rule is, 1. To measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line. 2. The next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line as he owned rods on the old. Then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. The new lines, thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals or exceeds or falls short of the old.

This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion; and the rule is obviously founded in that principle of equity upon which the distribution ought to be made. It may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin if it happens to be elongated by deep indentations or sharp projections. In such case it should be reduced, by an equitable and judicious estimate, to the general available line of the land upon the river. We are not aware that in the present case any such modification will be necessary, and therefore the general rule may be applied, and will do justice between the parties.[1]

[1] See *Trustees of Hopkins Academy* v. *Dickinson*, 9 Cush. 544 (1852), where it is said, p. 552: "In ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel, or lowest and deepest part of the stream."

See also *Johnston* v. *Jones*, 1 Black, 209, 222; and cf. *Newton* v. *Eddy*, 23 Vt. 319.

MILLER v. HEPBURN.

COURT OF APPEALS OF KENTUCKY. 1871.

[*Reported* 8 *Bush*, 326.]

JUDGE HARDIN delivered the opinion of the court.

The appellees, claiming title as the children and representatives of William Preston, deceased, to some lots of ground in the city of Louisville, situated near the foot of Jackson Street, and between Fulton Street and the Ohio River, instituted their actions against the

The rules on the cognate subject of dividing flats are given in a note by the reporter to the case of *Commonwealth* v. *Roxbury*, 9 Gray, 451, 521–523 (1857), as follows: —

"The general rules for the division of flats among coterminous proprietors, so far as they can be ascertained from the adjudged cases, may be thus stated: —

"1st. The intention of the ordinance was 'if practicable, to give to every proprietor the flats in front of his upland, of equal width with his lot at low-water mark.' Wilde, J., in *Gray* v. *Deluce*, 5 Cush. 12; and see *Deerfield* v. *Arms*, 17 Pick. 45. Whether the proprietor of upland, even if bounding on a cove, can claim flats in any other direction than towards low-water mark, has not been adjudged. The late Chief Justice Shaw and Mr. Samuel Hoar, sitting as referees, awarded that he could; Chief Justice Parker and Mr. Justice Wilde were of opinion that he could not. *Jones* v. *Boston Mill Corporation*, 6 Pick. 151, 156; *Rust* v. *Boston Mill Corporation*, 6 Pick. 161, 167; and see *Thacher* v. *Fox*, 26 Me. 495.

"2d. The nearest channel from which the tide never ebbs, though not adapted to navigation, is the limit. *Sparhawk* v. *Bullard*, 1 Met. 107; *Ashby* v. *Eastern Railroad*, 5 Met. 370; *Walker* v. *Boston & Maine Railroad*, 3 Cush. 22, 24; *Attorney-General* v. *Boston Wharf*, 12 Gray, 553.

"3d. The direction of the side-lines of the flats is not governed by that of the side-lines of the upland. *Rust* v. *Boston Mill Corporation*, 6 Pick. 169; *Piper* v. *Richardson*, 9 Met. 158; *Curtis* v. *Francis*, 9 Cush. 438, 442; *Emerson* v. *Taylor*, 9 Greenl. 45. Unless expressly so agreed by the parties. *Dawes* v. *Prentice*, 16 Pick. 442.

"4th. Where there is no cove or headland, a straight line is to be drawn according to the general course of the shore at high water, and the side-lines of the lots extended at right angles with the shore-line. *Sparhawk* v. *Bullard*, 1 Met. 106; *Porter* v. *Sullivan*, 7 Gray, 443; *Deerfield* v. *Arms*, 17 Pick. 45, 46; *Knight* v. *Wilder*, 2 Cush. 210.

"5th. Around a headland, the lines dividing the flats must diverge towards low-water mark. Wilde, J., in *Gray* v. *Deluce*, 5 Cush. 12, 13. Shaw, C. J., in *Porter* v. *Sullivan*, 7 Gray, 443. *Emerson* v. *Taylor*, 9 Greenl. 46.

"6th. In a shallow cove, in which there is no channel, a base-line may be run across the mouth of the cove, and parallel lines drawn, at right angles with the base-line, from the ends of the division-lines of the upland to low-water mark. *Gray* v. *Deluce* 5 Cush. 12, 13. *Attorney-General* v. *Boston Wharf*, 12 Gray, 553.

"7th. A deep cove, out of which the tide entirely ebbs at low water, is to be divided by drawing a line across its mouth, giving to each proprietor a width upon the base-line proportional to the width of his shore-line, and then drawing straight converging lines from the divisions at the shore to the corresponding points on the base-line. This rule (which is substantially that suggested by the magistrates in 1683) was first received by Wilde, J., in the hypothetical case of a cove the circumference of which was twice as diameter, or deeper than a semicircle. *Rust* v. *Boston Mill Corporation*, 6 Pick. 167, 168. It has since been acted upon in other cases, the reports of which contain no plan or description of the proportions of the coves in question. *Sparhawk* v.

appellants in June, 1867, for the recovery of parts of the lots then in the defendants' possession, they owning and occupying an adjacent lot, which, with those of the plaintiffs and the interference in controversy, is shown by the diagram here inserted; the plaintiffs owning in the largest lot, No. 4, the lots in controversy, which when laid off in 1830 abutted on the *then* line of the river at the letter G, but now, as contended by the appellees, are in consequence of an alluvion formed in front of them, and the consequent recession of the river, prolonged to the present water-line at the letter H; while the defendants, who own the lot No. 5, claim that as the accretion was formed and the

Bullard, 1 Met. 107; *Wheeler* v. *Stone*, 1 Cush. 323. And see *Ashby* v. *Eastern Railroad*, 5 Met. 369, 370; *Deerfield* v. *Arms*, 17 Pick. 45, 46.

"8th. The direction of the side-lines of flats in a cove may be modified by the course of the channel bounding them, or by the position of other channels between part of that channel and the upland. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 22, 23, 24; *Commonwealth* v. *Alger*, 7 Cush. 69; *Porter* v. *Sullivan*, 7 Gray, 448, 449; *Attorney-General* v. *Boston Wharf*, 12 Gray, 553.

"9th. It seems that after passing the mouth or narrowest part of a cove, the lines may diverge, if necessary to preserve the proportions of different estates. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 25.

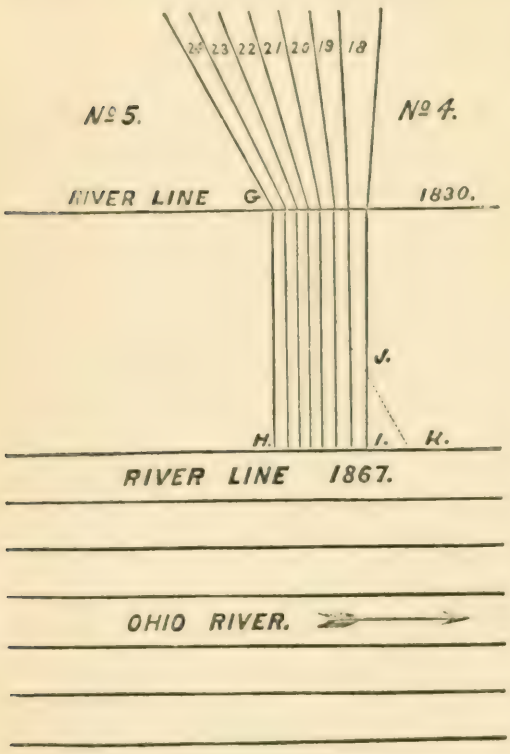
"10th. An agreement of coterminous proprietors as to the direction of their boundaries may be proved, or presumed from their acts and those of public authorities. *Sparhawk* v. *Bullard*, 1 Met. 95; *Curtis* v. *Francis*, 9 Cush. 442, 460, 463, 466; *Adams* v. *Boston Wharf*, 10 Gray, 521; *Attorney-General* v. *Boston Wharf*, 12 Gray, 553; *Rider* v. *Thompson*, 23 Me. 243; *Treat* v. *Chipman*, 35 Me. 34. Thus the lines of the flats at the foot of Summer Street in Boston have been repeatedly found by juries, under the instructions and with the approval of the court, to be parallel with the line of that street as established by the selectmen about 1663. *Valentine* v. *Piper*, 22 Pick. 95, 96; *Piper* v. *Richardson*, 9 Met. 163; *Drake* v. *Curtis*, 9 Cush. 447, note. In the large cove to the northward of that street, the flats were distributed according to an agreement made in 1673 for the erection of a barricade against the Dutch; but the legal effect of that agreement has never been judicially ascertained. *Brimmer* v. *Long Wharf*, 5 Pick. 135, 138; *Wheeler* v. *Stone*, 1 Cush. 319, 320; *Commonwealth* v. *Alger*, 7 Cush. 73; Colony Law of 1681, 5 Mass. Col. Rec. 310, 311; Bowditch on Flats, 4.

"The ordinance of 1647 has been extended by usage to Plymouth, to Nantucket and Duke's County, and to Maine, although none of these were under the jurisdiction of Massachusetts when it was made. Sullivan on Land Titles, 285; *Barker* v. *Bates*, 13 Pick. 258, 260; *Mayhew* v. *Norton*, 17 Pick. 357; *Storer* v. *Freeman*, 6 Mass. 435; 2 Dane Ab. 701; *Codman* v. *Winslow*, 10 Mass. 146; *Lapish* v. *Bangor Bank*, 8 Greenl. 89, 93; *Weston* v. *Sampson*, 8 Cush. 354; *Commonwealth* v. *Alger*, 7 Cush. 76; *Moulton* v. *Libbey*, 37 Me. 485.

"The rule which has been adopted in Maine for the division of flats among coterminous proprietors, in the absence of any agreement between them, or any adverse possession, is to draw a base-line between the two corners of each lot at the shore, and then run a line from each corner, at right angles with the base-line, to low-water mark; and, if the side-lines diverge from or conflict with each other, to divide equally between the two proprietors the land excluded or included by both lines; and not to allow any subdivision of lots to change the side-lines as required by an earlier division of the upland. How this rule should be applied in a cove so deep as to bring more than two of such side-lines into conflict with each other, has never been decided. *Emerson* v. *Taylor*, 9 Greenl. 42; *Kennebec Ferry* v. *Brunswick*, 28 Me. 374; *Treat* v. *Chipman*, 35 Me. 36; *Call* v. *Lowell*, 40 Me. 31."

river receded, their west line, which terminated originally at the letter G, was gradually extended till it reached the present water-line at the letter K, crossing each of the plaintiffs' lots extended, as claimed by them, so that the ground in dispute is that indicated by the letters G, H, I, J.

The defences involved both a denial of the alleged title of the plaintiffs and an assertion of right in the defendants for substantially the following reasons: *First*, that the law continued the natural course of their side-line from the point G towards K as the river receded; *second*, that as the accretion was formed, said line was extended and adopted by the concurrence and acquiescence of the owners and tenants in possession of the adjacent lots; *third*, that the plaintiffs were barred by continued adverse possession of the ground in controversy.



The court was of the opinion that plaintiffs, as *riparian* proprietors of their lots originally fronting on the river, were entitled to the land added thereto by accretion, to be ascertained by extending the original river frontage of the respective lots, as nearly as practicable, at right angles with the course of the river to the thread of the stream, and rendered judgments in accordance with that conclusion; and these appeals are prosecuted for the reversal of these judgments.

The first question to be decided is, whether the rule adopted by the court for determining the extent of the plaintiffs' recovery, if they were entitled to recover at all, was correct. In the very able and ingenious argument of the counsel for the appellants in this court, the general principle is not questioned that in ascertaining the rights of a *riparian* proprietor no importance should be given to the quantity or figure of his entire tract, nor the course of its side-lines; and we presume it

unnecessary to resort to authority or illustration to prove that the appellants could not acquire title to the ground in controversy merely because of the oblique direction of the western side-line of their lot with reference to the general course of the river. But it is insisted for the appellants, in substance, that the court erred in adopting an arbitrary method of determining the relative rights of the parties by extending the side-lines of the plaintiffs' lots from their respective original *termini* on the shore as nearly as possible at right angles with the course of the river to the centre of the stream, instead of so drawing the lines as to give to each *riparian* proprietor such a proportion of the alluvial soil as the total extent of his front-line bears to the total quantity of the alluvial soil to be divided, without regard to the general course of the river or the centre of the stream; and we are referred to the cases of *Deerfield* v. *Arms*, 17 Pickering, 41; *Jones et al.* v. *Johnston*, 18 Howard, 150; *Johnston* v. *Jones et al.*, 1 Black, 209, as authority for this method of equitable apportionment.

In the first-cited case it does not distinctly appear whether Deerfield River, on which the alluvion was formed, was technically and according to the common law a navigable stream; all rivers being thereby deemed not navigable "above where the sea ebbs and flows." But it is apparent from the reasoning of the court in that case, as well as the other two cases cited, that the rules intended to be applied were those usually adopted for determining the relative rights of riparian owners of the banks of navigable rivers and lakes, and the division of flats on the sea-shore, or on coves in which the tide ebbs and flows. And as is properly said in the able and lucid opinion delivered by the special judge who decided these cases in the court below: "The rules thus laid down may be eminently proper in the division of the accretion upon the shores of navigable streams where the tide ebbs and flows, because the proprietor adjoining the edge of such river only owns to the water's edge, and low water is the end of the line; and hence, as the shore changes, the respective lines on such shore must change; but in a river not navigable — that is, where the tide does not ebb and flow — the proprietor does not stop at low water, but by permission and sufferance of the State he goes to the middle of the stream, and must have his shore-front to the middle; and it is a matter of little consequence whether islands are formed, or whether there is an accretion on the shore, or whether the water remains as it was when he received his grant: he is entitled to his front to the centre of the stream."

With reference to the distinction here taken, we are aware that jurists have differed in opinion whether in this country, as in England, the existence of tide-water should be the test of navigability, so far as riparian rights may be involved, the Ohio and many other fresh-water streams being practically navigable, subservient to commerce, and subject to maritime jurisdiction, though above and unaffected by the tide. But whatever contrariety of authority there may be on that question, it may be regarded as settled in this State in favor of the

common law rule since the decision of the case of *Berry* v. *Snyder* &c., 3 Bush. 266.

With a proper application of that rule in this case the solution of the question under consideration cannot be difficult. It does not appear that the general course and central thread of the river opposite to the ground in dispute cannot be ascertained under the judgment in these cases with sufficient certainty for practical purposes; and if it be true, as in effect adjudged by the lower court, that the several owners of the river-bank at which the accretion was formed were entitled to an extension of the original river-fronts of their lots across the accretion, upon lines drawn as nearly as practicable at right angles with the centre of the river, the only difficulty would seem to be in determining the course on which these lines should be drawn with reference to each other and the thread of the river at the terminus of each of the lines, which would be necessarily parallel or convergent or divergent, as the relative lengths and courses of the original shore-line and central line of the river might differ.

The principle of equitable apportionment contended for by the counsel for the appellants is manifestly right when applied in the division between conterminous proprietors of an alluvion on a lake or sea-shore, or even on the bank of a river below tide-water, where the titles of the riparian owners are limited by the water's edge, and the law indicates no particular course for the extension or enlargement of their boundaries over the alluvial soil; but it is clearly inconsistent with the right of each owner of the bank of a river above tide-water to carry his title to the middle of the stream.

The conclusion of the Court of Common Pleas on this point is not, in our opinion, inconsistent with the adjudged cases cited as authority against it when properly applied, and it is moreover substantially sustained by several decisions, among which may be cited the cases of *Knight* v. *Wilder*, 2 Cush. 199; *Larrimer* v. *Benson*, 8 Mich. 18; and *Rice* v. *Ruddiman*, 10 Mich. 125.

But it is further contended for the appellants that whatever may have been the legal right of themselves and those under whom they claimed to prolong their western line over the accretion as it was formed, it *was* so prolonged according to its original course, and recognized and established as the true line by the adjacent owners and their tenants. It appears that Jesse Vansicles, under whom the appellants claim as remote vendees, took possession of the large lot, No. 5, in 1849 or 1850, and that he did at one time undertake to extend the line as it is now claimed by the appellants; but his right to do so was disputed by the tenants of the appellees, and the attempt was not persisted in, although then and afterward a path or roadway extended to the river near where the line would be as claimed by the appellants.

We are not satisfied from the evidence that the supposed continuation of the line was at any time sanctioned or agreed to by the appellees; but if it was, the agreement, whether express or implied,

existing in parol only, did not divest the plaintiffs of their title. *Robinson, &c.* v. *Conn*, 2 Bibb, 124; *Smith* v. *Dudley*, 1 Littell, 66.

As to the question of limitation, it is sufficient to say that it does not appear that the appellants were in the adverse possession of the ground in controversy at an earlier period than 1860 or 1861, and the action was not therefore barred.

Wherefore, no error being perceived in the judgments, the same are affirmed.

St. John Boyle, for appellants.

William Preston, *M. C. Johnson*, *John Mason Brown*, for appellees.

COOK *v.* McCLURE.

COURT OF APPEALS OF NEW YORK. 1874.

[*Reported* 58 *N. Y.* 437.]

APPEAL from a judgment of the General Term of the Supreme Court in the Fourth Judicial Department, affirming a judgment in favor of defendant entered upon a verdict. Reported below, 2 N. Y. S. C. (T. & C.) 434.

This was an action of ejectment, brought to recover a small strip of land in Springville, Cattaraugus County, in the possession of the defendant, and upon which he had erected and maintained for some years a building, used for a storehouse.

The claim of the plaintiff was that the strip of land was formerly covered with the water of a millpond, caused by the backflow of the water of Spring Creek, by reason of the erection and maintenance of a milldam across said creek, erected and maintained for many years for the supply of a mill owned and operated by the plaintiff and those under whom she claimed. The plaintiff and defendant claimed under the same title and the same grantors. The premises owned by plaintiff were first deeded; the deed included the land covered by the pond. The boundary lines between the lands deeded and those subsequently conveyed and owned by defendant are given in the deed as follows: "Thence southerly along said line (*i. e.*, of land owned by the late Jarvis Bloomfield) to the corner-store standing in the southwest corner of said Bloomfield's land; thence south fifty-five degrees east to a stake near the high-water mark of the pond of the grist-mill; thence northeasterly along the high-water mark of said pond to the upper end of said pond, or to the north line of said lot number nine." Evidence was given, on the part of plaintiff, tending to show that the place where the defendant's store stood was covered at times, before he took title, by the waters of said pond, and that the ground was made in whole or in part by accretions of land and the subsidence of the waters of the pond, or the changes of the same, subsequent to the conveyance under which plaintiff claimed.

The court, among other things, charged the jury: "That where a man's boundary line is a stream of water, if natural causes added to the soil by accretion, the soil thus added belonged to the owner of the bank or shore." Also, "that if such natural accretion took place when the boundary line was a pond, such accretion belonged to the adjacent owner where the accretion was deposited." To which the counsel for the plaintiff duly excepted.

John C. Strong, for the appellant.

William H. Gurney, for the respondent.

GROVER, J. The only questions in this case were upon the two exceptions taken by the appellant to the charge to the jury. The judge charged, that where a man's line is a stream of water, if natural causes added to the soil by accretion, the soil thus added belonged to the owner of the bank or shore. To this the appellant excepted. He further charged, that if such natural accretion took place where the boundary line was a pond, such accretion belonged to the adjacent owner when the accretion was deposited.

The first proposition charged it is scarcely necessary to discuss, as the question involved in the case is more distinctly presented by the exceptions taken to the second. That question is, whether, under the facts of this case, the boundary in the deed under which the plaintiff, by several mesne conveyances, makes title, establishes a fixed and permanent line, or whether such line would follow a change in the water of the pond if produced by natural causes. The proof shows that at the time of the conveyance the grantor owned all the lands claimed by both parties. He conveyed the land claimed by the plaintiff, describing the disputed boundary as follows: Commencing (for this purpose) at a store lately owned by Jarvis Bloomfield, standing in the southwest corner of his lot, thence south fifty-five degrees east one chain and seventy-nine links to a stake near the high-water mark of the pond of the grist-mill, thence northeasterly along the high-water mark of said pond to the upper end of said pond, or to the north line of said lot number nine. The question is as to this last boundary. The pond was an artificial one, raised by a dam across a running stream, for the purpose of creating power to propel the machinery of mills then owned by the grantor and included in the deed. The proposition where the boundary is upon a stream is correct, with the qualification that such accretion of alluvium, to inure to the riparian owner, must be imperceptible; that the amount added in any moment could not be perceived. *Halsey* v. *McCormick*, 18 N. Y. 147; 3 Kent, 428; Angell on Watercourses, § 53 and note. I do not think that there is any distinction in this respect between a boundary upon a running stream of water and a pond. Failing to make this qualification may not have prejudiced the appellant. If his counsel thought it would, he should have called attention to it, and requested a modification of the charge in this respect.

But this does not reach the real question in the case; that is, whether the boundary was not made by the deed fixed and permanent,

so that if the water from natural causes encroached upon the land beyond high-water mark, as it was at the time of the giving the deed covering a portion of such land, the land so covered would not have remained the property of the grantor; and whether, on the other hand, if the water of the pond, from such causes, had receded so as to leave dry land below the then high-water mark, such land would not be the property of the grantee, or whether the line would continue to be the high-water mark of the pond as changed by such causes. It may be remarked that the reason given in the cases where the boundary is upon the banks of the stream that it should go to low-water mark, and in some cases for giving the alluvium insensibly formed to the riparian owner, — that the party should not be cut off from, but continue to have access to the water for use, — has no application to the case. The line was fixed at the high-water mark of the pond. Hence the grantor reserved to himself no interest whatever in the water or the land covered by it. He could not, without trespassing, reach the water at all, only when at high-water mark, and then he had no right to or in it for any purpose. The land between high and low water mark clearly passed to the grantee under the deed. Again, the grantor was under no obligation to keep up the dam or pond. He could cut down the dam and use the land for any purpose he chose. Should the pond from any cause fill up along the disputed boundary, he had the right of clearing it out up to the line. Had the bank been partially washed away by the action of the water, the grantor had the right of filling in to the line. But these rights would not exist, should the line be held to continue at high-water mark, as that might from time to time be changed by the action of the water from natural causes. This right, claimed by the defendant, of acquiring title by accretion, if it existed, could be terminated by the plaintiff by a removal of the dam. I think the language of the deed indicates a clear intention to establish a fixed and permanent line, and not one changeable by the changes in the high-water mark of the water in the pond. It follows that the charge, when applied to the facts in this case, was erroneous. The boundary between the parties was the high-water mark at the time of the deed to Bradley, and the jury should have been so charged. Whether alluvium had been formed had nothing to do with the case. The evidence was such that the jury may have found that the land in dispute was alluvium, formed by the natural action of the water below this line; and if so, under the charge they would have found it was the defendant's; while if the fact was so, the title was in the plaintiff.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

All concur, except CHURCH, C. J., not voting.

Judgment reversed.[1]

[1] See *Eddy* v. *St. Mars*, 53 Vt. 462.

In *Boorman* v. *Sunnuchs*, 42 Wis. 233 (1877), it was said that an alluvion on a natural pond, the soil of which is in the State or the United States, acquires title to land

CHAPTER II.

LAPSE OF TIME.

NOTE. — After original acquisition, the next kinds of acquisition to consider are those where the things acquired have been the property of some one before the acquisition, but where the persons acquiring them do not in any way base their ownership on the title of any particular former owners, but get a title good against all the world. These modes of acquisition are two: I. The taking of land, by or under the authority of the State, for public purposes or to discharge taxes laid in substance, if not in form, on the land.

II. The acquisition of title by lapse of time.

Only a small part of this mode is here considered.

SECTION I.

STATUTES OF LIMITATION.

A. *Statutes.*

3 Edw. I. *c.* 39 (1275). — And forasmuch as it is long time passed since the writs undernamed were limited; it is provided, That in conveying a descent in a writ of right, none shall presume to declare of the seisin of his ancestor further, or beyond the time of King Richard, uncle to King Henry, father to the King that now is; and that a writ of *Novel disseisin*, of Partition, which is called *Nuper obiit*, have their limitation since the first voyage of King Henry, father to the King that now is, into Gascoin. And that writs of *Mortdancestor*, of Cosinage, of *Aiel*, of Entry, and of *Nativis*, have their limitation from the coronation of the same King Henry, and not before. Nevertheless all writs purchased now by themselves, or to be purchased between this and the Feast of St. John, for one year complete, shall be pleaded from as long time, as heretofore they have been used to be pleaded.

32 Hen. VIII. *c.* 2, §§ 1–6 (1540). — Forasmuch as the time of limitation appointed for suing of writs of right, and other writs of possession and seisin of men's ancestors or predecessors, or of their own possession or seisin, by the laws and Statutes of this realm heretofore made, limited and appointed, extend, and be of so far and long time

left by imperceptible accretion. In *Hodges* v. *Williamas*, 95 N. C. 331 (1886), it was held that if the bed of a natural pond had been granted by the State, an abutter on the pond would not acquire title to land left by gradual accretion, and it was said that the same would be true in the case of unnavigable streams. *Sed qu.*

See *Stein* v. *Brooklyn*, 101 N. Y. 51.

past, that it is above the remembrance of any living man, truly to try and know the perfect certainty of such things, as hath or shall come in trial, or do extend unto the time and times limited by the said laws and Statutes, to the great danger of men's consciences that have or shall be impanelled in any jury for the trial of the same; (2) and it is also a great occasion of much trouble, vexation and suits to the King's loving subjects at the common laws of this realm; so that no man, although he and his ancestors, and those whose estate he or they have, have been in peaceable possession of a long season, of and in lands, tenements and other hereditaments, is or can be in any surety, quietness or rest, of and in the same, without a good remedy and reformation be had, made and provided for the same: (3) be it therefore enacted by the King our sovereign lord, the lords spiritual and temporal, and the commons, in this present Parliament assembled, and by the authority of the same, That no manner of person or persons shall from henceforth sue, have or maintain any writ of right, (4) or make any prescription, title or claim of, to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies or other hereditaments, (5) of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is, or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies or other hereditaments, within threescore years next before the *teste* of the same writ, or next before the said prescription, title or claim so hereafter to be sued, commenced, brought, made or had.

II. And be it further enacted by the authority aforesaid, That no manner of person nor persons shall hereafter sue, have or maintain any assise of mort-ancestor, cosinage, ayel, writ of entry upon disseisin done to any of his ancestors or predecessors, or any other action possessory, upon the possession of any of his ancestors or predecessors, for any manors, lands, tenements or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was, or hereafter shall be seised of the same manors, lands, tenements or other hereditaments, within fifty years next before the *teste* of the original of the same writ hereafter to be brought.

III. And be it further enacted by the authority aforesaid, That no person nor persons shall hereafter sue, have or maintain any action for any manors, lands, tenements or other hereditaments of or upon his or their own seisin or possession therein, above thirty years next before the *teste* of the original of the same writ hereafter to be brought.

IV. And be it also enacted by the authority aforesaid, That no person nor persons shall hereafter make any avowry or cognizance for any rent, suit or service, and allege any seisin of any rent, suit or service in the same avowry or cognizance, in the possession of his or their ances-

tors or predecessor or predecessors, or in his own possession, or in the possession of any other, whose estate he shall pretend or claim to have above fifty years next before the making of the said avowry or cognizance.

V. And over that be it enacted by the authority aforesaid, That all formedons in reverter, formedons in remainder, and *scire facias* upon fines, of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued, used and taken within fifty years next after that the title and cause of action fallen, and at no time after the said fifty years passed.

VI. And be it also enacted by the authority aforesaid, That if any person or persons at any time hereafter do sue any of the said actions or writs, for any manors, lands, tenements or other hereditaments, (2) or make any avowry, cognizance, prescription, title or claim of or for any rent, suit, service or other hereditaments, (3) and cannot prove that he or they, or his or their ancestors or predecessors, were in actual possession or seisin of and in the same manors, lands, tenements, rents, suits, services, annuities, commons, pensions, portions, corrodies or other hereditaments, at any time or times within the years before limited and appointed in this present Act, and in manner and form as is aforesaid, (4) if the same be traversed or denied by the party plaintiff, demandant, or avowant, or by the party tenant or defendant, that then and after such trial therein had, all and every such person and persons and their heirs, shall from henceforth be utterly barred forever, of all and every the said writs, actions, avowries, cognizance, prescription, title, or claim hereafter to be sued, had or made, of and for the same manors, lands, tenements, hereditaments or other the premises, or any part of the same, for the which the same action, writ, avowry, cognizance, prescription, title or claim hereafter shall be at any time had, sued or made.

21 Jac. I. c. 16, §§ 1, 2 (1623). — For quieting of men's estates, and avoiding of suits, be it enacted by the King's most excellent majesty, the lords spiritual and temporal, and commons, in this present Parliament assembled, That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, at any time hereafter to be sued or bought, of or for any manors, lands, tenements or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of Parliament: and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements or hereditaments; (2) and that all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended

or fallen, and at no time after the said twenty years;[1] (3) and that no person or persons that now hath any right or title of entry into any manors, lands, tenements or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or Statute to the contrary notwithstanding.

II. Provided nevertheless, That if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this Act; (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

B. *Operation of the Statute*

STOKES *v.* BERRY.

Nisi Prius. 1699.

[*Reported* 2 *Salk.* 421.]

If A. has had possession of lands for twenty years without interruption, and then B. gets possession, upon which A. is put to his ejectment, though A. is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession. Ruled *per* Holt, C. J. The same point was ruled by Holt, C. J., at Lent Assizes for Bucks, 12 W. 3, because a possession for twenty years is like a descent, which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment.

[1] See *Tolson* v. *Kaye*, 3 Brod. & B. 217; *Dow* v. *Warren*, 6 Mass. 328.

SCHOOL DISTRICT NO. 4 IN WINTHROP *v.* BENSON.

SUPREME JUDICIAL COURT OF MAINE. 1850.

[*Reported* 31 *Me.* 381.]

WRIT OF ENTRY. There was evidence tending to prove that the land formerly belonged to the ancestor of the defendants; and that the plaintiffs had occupied a portion, or the whole of it, for more than forty years, for a school-house, woodshed, and woodyard. It was proved that a wooden school-house was erected there by the plaintiffs in 1802; it was taken down and a brick school-house was built in 1818 on the lot, near the site of the wooden one. A woodshed was placed near the brick school-house in 1824. In 1847 one Samuel Wood was the school agent. He was called by the defendants as a witness, and testified that he procured the woodshed to be removed in the spring of 1847 from the northwesterly end of the school-house to the back side of the school-house at the other end; that he found the building must be removed; that it had been on another man's land on sufferance; that the defendants asserted a title, and showed it to him, and required the building to be removed; that he became satisfied the district had no title to the land, and that he removed the building for that reason. That the expense of removing it was $25, which was paid by the town, out of the money assigned to that district.

The plaintiffs objected to said Wood's testimony as not legally admissible, but the objection was overruled. It appeared, from the records of the district, that in June, 1847, soon after the removal of the shed, they had a meeting and took action for sustaining whatever claim they had to the land.

The defendants in their argument contended that if, in 1847, the agent of the school district, at the request of the defendants, removed the woodhouse to its present location, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges; then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive, and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover in this suit. The court, in opposition to the argument of the plaintiffs' counsel, gave such instructions.

The verdict was for the defendants, and the plaintiffs excepted.

May, for the plaintiffs.

Evans, for the defendants.

WELLS, J. The jury were instructed that if, in 1847, the agent of the school district, at the request of the defendants, removed said wood

house where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true, that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseisin, and the acts which they describe will have that effect if not controlled or explained by other testimony. *Little* v. *Libbey*, 2 Greenl. 242; *The Proprietors of Kennebec Purchase* v. *John Springer*, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseisin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same is barred by limitation. Stat. c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by a disseisin or by deed; it vests the fee-simple, although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof; and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it; and the appropriate mode of conveying it is by deed.

No doubt a disseisor may abandon the land, or surrender his possession by parol, to the disseisee, at any time before his disseisin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title, obtained by a disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an

undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands creates nothing more than an estate or lease at will. Stat. c. 91, § 30.

The exceptions are sustained and a new trial granted.[1]

HUGHES *v.* GRAVES.

SUPREME COURT OF VERMONT. 1867.

[*Reported* 39 *Vt.* 359.]

THIS cause was an act of trespass *quare clausum fregit*, with counts in trespass on the case joined agreeably to the Statute. The action, by the agreement of the parties, was referred, to be decided according to law, and the defendant filed exceptions to the report of the referees.

On the hearing upon the said report and exceptions at the March Term, 1866, *Kellogg*, J., presiding, the court, *pro forma*, decided that the plaintiff was entitled to recover of the defendant the sum of ten dollars for his damages, as stated in the report, and rendered judgment in favor of the plaintiff on the report accordingly. To this decision and judgment the defendant excepted.

The referees reported as follows: "The plaintiff and defendant are severally the owners and occupiers of adjacent lots of land in the village of Fairhaven, both lots being originally parcels of an entire lot and each party deriving title to his lot from a common source. The west line of the plaintiff's lot, as shown by his title-deeds, runs from the northwest corner of his dwelling-house, southerly to the northwest corner of the Whipple lot. This line formed the eastern boundary of ancient highway, discontinued more than fifty years since, running over the lot of the defendant. Joshua Quenton, an intermediate grantor of the plaintiff, obtained his title to the lot in 1806, and he and his heirs owned and occupied it until May, 1847. During this period the Quentons enclosed with a fence a strip of land about ten feet wide at the north end, which extended southerly and adjoining the plaintiff's west line from the said northwest corner of the plaintiff's dwelling-house, to and beyond the south line of the defendant's lot taken from said ancient highway, making a portion of their door yard, and continued to occupy peaceably and adversely claiming it as their own for more than fifteen years. In the fall of 1847 an intermediate grantor of the defendant claims this strip of land, sawed the fence in two where the south line of the defendant's lot would strike it. But the fence after two or three months was rebuilt by the plaintiff's grantor and the occupation in them continued till March, 1861, as the fence was still standing when the plaintiff took

[1] See *Armstrong* v. *Easton*, 5 Md. 256; *Schall* v. *Williams Valley R. R. Co.*, 35 Pa. 191.

possession under his deed, and when the defendant purchased his lot in April, 1862, he claimed it and in the summer of 1862 erected a store which extended eastward within about eight inches of the plaintiff's dwelling-house and covered not only a portion of the strip of land so enclosed by the Quentons taken from the old highway and the plaintiff's lot, but also a small portion of land included within the boundaries of the plaintiff's lot. None of the deeds prior to the deed of Olive Kelsey to I. Davey, of March 23d, 1860, by and through which the plaintiff claims title to his lot, in their boundaries included the piece of land enclosed by Quenton and taken from said old highway, and which actually formed part of the door yard to the plaintiff's house. If the court shall be of opinion that the plaintiff takes nothing by Quenton's possessory title because the land so claimed was not included in the boundaries of his deed, then we only find for the plaintiff to recover of the defendant seven dollars damages and his costs, otherwise we find for the plaintiff to recover of the defendant ten dollars damages and his costs."[1]

Nicholson and *Ormsbee* and *E. N. Briggs*, for the defendant.

H. G. Wood, *Prout* and *Dunton*, for the plaintiff.

The opinion of the court was delivered by

STEELE, J. The plaintiff is in actual possession and by his deed from Olive Kelsey is entitled to the benefit of her possession. Her possession was prior to any possession by the defendant or his grantors. The plaintiff will therefore maintain this action of trespass as against the defendant by virtue of mere prior possession, unless the defendant has a right to the possession. It is then the defendant's right and not the plaintiff's which we are required to examine. The defendant shows a faultless chain of title on paper, but it turns out he does not own the land. One Quenton acquired the ownership by fifteen years' possession adverse to the defendant's grantors. The defendant's chain of deeds represents nothing in the disputed land except what his grantors lost and Quenton gained. If Quenton's title had been by deed from the defendant or his grantors, it is clear the defendant could not lawfully have disturbed the plaintiff's prior possession. Quenton had no deed, but his adverse possession for the statutory period gave him an absolute indefeasible title to the land against the whole world on which he could either sue or defend as against the former owner. That being the case, is there sufficient virtue left in the defendant's paper title to warrant him in disturbing the plaintiff's possession? Under the present English Statute of Limitations it is settled there would not be. The case would stand precisely as if the defendant or his grantors had conveyed to Quenton. The plaintiff would be liable to be interrupted in his possession only by Quenton or some person under him. *Holmes* v. *Newland*, 39 E. C. L. 48 (11 A. & E. 44). In *Jukes* v. *Sumner*,

[1] The deed Joshua Quenton to Olive Kelsey is dated May 25th, 1847. The deed Olive Kelsey to I. Davey, is dated March 23d, 1860. The deed I. Davey to the plaintiff, is dated August 25th, 1860. The two latter deeds embraced the land in question. — REP.

11 Mees. & Welsby, 41, Parke, B., remarking upon the present English Statute 3 & 4 W. IV. *c.* 27, says the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after the period of twenty years has elapsed. The several English Statutes, and their supposed points of difference, are commented upon in 2 Smith's Lead. Cases, 469, 559 *et passim*, and the case *Fenner* v. *Fisher*, Cro. Eliz. 288, is cited in *Holmes* v. *Newland*, *ubi supra*, as an authority under the previous Statutes against the application to *these* Statutes of the full extent of the rule applied to the Statute of William IV. Any extended discussion of these English Statutes would be unprofitable here, for our Statute, though mainly borrowed at the outset from the Statute of James, was somewhat modified when transferred to Vermont, and has been materially altered in form in passing through the several revisions to which our laws have been subjected. It now provides, after the section relating to *actions*, that "*no person having right or title of entry into houses or lands shall thereinto enter but within fifteen years next after such right of entry shall accrue.*" The first section takes away the remedy, and the second the right. G. S. p. 442, §§ 1 and 2. The title is vested in the adverse holder for the statutory period, or, as is often said, "the adverse possession ripens into title." As a natural consequence, the former owner is divested of all the new owner acquires. This interpretation giving to adverse possession for fifteen years the effect of a conveyance, best accords with the other well-settled doctrines upon the subject of limitations as applied to real property. A covenant to convey perfect title is satisfied by conveying a title acquired under the Statute. In this country, as in England, an agreement made after the lapse of the statutory period to waive the benefit of the Statute is not effective, but the title remains in the party who has acquired it under the Statute, notwithstanding his waiver, until he conveys it back with all the solemnities required in any deed of land. In language of the books, "by analogy to the Statute of Limitations, we presume a *grant* of incorporeal rights after adverse uses for fifteen years." It would certainly be an artificial construction of the Statute which would make it a mere bar to the owner's right against the *person* only who occupied adversely. It relates to the rights of the party to the *land*. It makes no reference to *persons*. In this case, if the plaintiff's enjoyment of the land subjects him to an action or entry by Quenton, on the ground that Quenton and not the defendant is the true owner, it ought not at the same time to subject him to action or entry by the defendant, on the ground that the defendant is the true owner of the land. We are satisfied that no title remains in the defendant, and that under our Statute he has no right to the possession. It has been held that a plaintiff in possession without right could maintain trespass against even the true owner for a disturbance, while the right of possession was in a third person by lease from the owner. *Phillips* v. *Keat and Miller*, 3 Zabriskie, N. J. Rep. 155. Here neither the right of possession nor the ownership was in the defendant.

The plaintiff claims that upon a correct construction of the deeds he has Quenton's title. This point we have not decided. The plaintiff's prior possession will enable him to recover as against the defendant whose grantors suffered Quenton to acquire the land by adverse possession for the statutory period.

Judgment affirmed.

C. *Disseisin and Adverse Use.*

NOTE. — See 1 Gray, Cases on Property, 452–455.

BLUNDEN *v.* BAUGH.

KING'S BENCH. 1632.

[*Reported Cro. Car.* 302.]

ERROR of a judgment in the Common Pleas. Baugh brought an ejectment of lands in Blechingley of the demise of Charles Earl of Nottingham against Blunden. Upon Not guilty pleaded, a special verdict was found, that 39 Eliz. Charles Lord Howard, Lord Admiral, being seised of the said land in tail, by indenture covenanted, in consideration of marriage betwixt Sir William Howard his eldest son and heir and Elizabeth daughter and heir of Lord St. John, to suffer a recovery of those lands to the use of the said William and Elizabeth, and the heirs males of the body of the said William, with divers remainders over; that the marriage took effect, and the said William entered by the assent of his father and occupied at his will; and in 4 Jac. 1, by indenture demised that land to Thomas Humphrys and John Humphrys for twenty-one years, rendering £115 rent: they enter, and were possessed *prout lex postulat:* and being so possessed, the said Charles, then Earl of Nottingham, and the said William, then Lord Effingham, by indenture covenanted with Sir Robert Dormer and others (for that the said indenture of 39 Eliz. was not executed for the performance of the assurances and uses comprised therein) to levy a fine of those lands to the use of the said William Lord Effingham and Elizabeth, for a jointure for the said Elizabeth, and to the heirs males of the body of the said William, the remainder over as in the indenture, &c.; which fine was levied accordingly, and to the uses in the said indenture mentioned: that in 9 Jac. 1, the said William Lord Effingham died without issue male of his body; and John Humphrys died: and in 14 Jac. 1, Thomas Humphrys being seised or possessed *prout lex postulat*, by indenture enrolled within six months, in consideration of a competent sum of money, bargained and sold the said lands to Charles Lord Effingham, son and heir apparent to the earl, and his heirs. Charles Earl of Nottingham dies; Charles, now Earl of Nottingham, being his son and heir, entered. Blunden, the defendant, by the command of the said Elizabeth, entered

and claimed it as her jointure. And Charles, now Earl of Nottingham, son and heir of the said Charles Earl of Nottingham the Lord Admiral, entered, and made a lease for three years to the plaintiff, who entered, and the defendant, as servant of the said Elizabeth, and by her command, ousted him. And if *super totam materiam* the court should adjudge for the plaintiff, they found for the plaintiff; if otherwise, for the defendant; and they found the said Elizabeth to be yet alive.

After arguments at the bar in the Common Pleas and at the bench, it was, by the opinion of RICHARDSON, Chief Justice, HUTTON, and VERNON, adjudged for the plaintiff, against the opinion of HARVEY, Justice, who argued strongly for the defendant. And hereupon a writ of error was brought, and the error assigned only in the matter of law. And it was divers times very well argued at the bar by *Littleton*, Recorder of London, and *Serjeant Brampston*, for the defendant in the writ of error, and by *Calthrop* and *Serjeant Henden*, for the plaintiff; and afterward by all the Justices of the King's Bench *seriatim*.

And JONES, BERKLEY, and MYSELF held, that the judgment was erroneous. The main question was, Whether by any of these acts there was a disseisin committed to Charles Earl of Nottingham *nolens volens;* and if there be a disseisin, who should be the disseisor and tenant to the freehold? And to the first, JONES, BERKLEY, and MYSELF held, that the law will not impute nor construe it to be a disseisin unless at the election of Charles Earl of Nottingham, when as none of the parties intended it to be a disseisin, nor to oust him of the possession; for, as Co. Lit. 153 b. defines, "A disseisin is when one enters, intending to usurp the possession, and to oust another of his freehold;" and therefore *quærendum est a judice, quo animo hoc fecerit*, why he entered and intruded; and it is at the election of him to whom the wrong is done, if he will allow him to be a disseisor, or himself out of possession; and therefore if one receive my rent, it is at my election if I will charge him with a disseisin, by bringing an assise or other action, or have an account. And if an infant make a lease for years rendering rent, and the lessee enter, it is at the election of the infant to charge him in assise, or to bring debt for the rent, or to accept the rent at his full age, as 7 Edw. 4, 6, and other books be. So it is if one enters, claiming as guardian in socage, or by nurture, where he is not, it is at the election of the infant to bring an assise, or to charge him as guardian, thereby admitting him to be in without wrong; as 49 Edw. 3, 10; 40 Edw. 3; "Accompt," 35 and 33 Hen. 6, 2, and many other books be. And tenant at will is at the will of both parties; and the will shall not be determined by every act. *Vide* 28 Hen. 8; 62 Kelway; 20 Hen. 7, 65. So where a *feme* lessee at will takes husband, or a *feme* makes a lease at will, and takes husband, although the *feme* hath put her will in her husband, yet it shall not be said a determination without the election of the lessor or husband to the contrary. 38 Hen. 8; Dyer, 62. Lessee surrenders, and yet occupies, he is no disseisor, but at the pleasure of the lessor. 11 Ass. 6, where a man makes a feoffment and continues in

possession: and the common case where a copyholder makes a lease for years, not warranted by the custom, yet it is no disseisin; and the law accounts it a good lease betwixt lessor and lessee and all estrangers: and to that purpose was cited Hilary, 18 Jac. 1, Rot. 792, *Strat* v. *Virrall*, *ejectione firmæ* brought upon such a lease; and upon special verdict adjudged for the plaintiff, that it is a good lease against all but the lord. And they all relied upon another judgment in the point, betwixt *Pousley* v. *Blackman*, Cro. Jac. 659, where one Carr bargains and sells land, by indenture enrolled, to Bertram, upon condition that upon payment of three hundred pounds at the end of three years it should be void; and that in the interim the bargainee should not meddle with the profits of the land. The bargainor occupies and makes a lease for five years, and at the day doth not pay the money; the bargainee doth not enter, but (the bargainor occupying it) he devised that land: and it was adjudged a good devise; but if he had been disseised, the devise had been void. And here it shall not be intended that the son intended to disseise his father, but that the lease was made by the assent of the father: also the party to whom the lease is made doth not claim any freehold, but to have the lease only, and to pay his rent, and pays the rent accordingly; so there was no intent in any of the parties to make a disseisin, then the law shall not construe it to be a disseisin *partibus invitis*. And hereby it follows, that the freehold remains in the Earl of Nottingham until the fine levied by him and his son: and so the uses well raised, and the jointure well assured.

Secondly, admitting there were a disseisin committed by these acts, the question is, Who is disseisor and tenant of the freehold? And Jones, Berkley, and Myself held, that William Lord Effingham, who made the lease, is the disseisor and tenant: for when tenant at will takes upon him to make a lease for years, which is a greater estate than he may make, that act is a disseisin; and by this lease for years made, and the lessee's entering and paying the rent unto him, and he accepting thereof, he is in as lessee, and the lessor is the disseisor, and hath the reversion expectant upon this lease; and this lease betwixt them is an interest derived out of the inheritance gained by this disseisin: for if a lessee for years make a feoffment, although it be a disseisin to the lessor, yet it is a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee is in the *per*; as 4 Edw. 2, Brev. 403; 19 Edw. 2, Brev. 770; 15 Hen. 3, Brev. 878; F. N. B. 201; 8 Hen. 7, 6, *per finem temp.* Edw. 1, *Counterplee de Voucher*, 126; and Co. Lit. 367 a. And warranty may be annexed to such an estate, upon which he may vouch, as 50 Edw. 3, 12. And if such lessee for years, or at will, makes a gift in tail, or a lease for life, that creates a good lease or a good gift in tail amongst themselves and all others, besides the first lessor; and as to him they are both disseisors, as it appears by the books 14 Edw. 4, 6; 18 Edw. 3, Issue, 36; 7 Edw. 3, Issue, 7; 14 Edw. 3, *Feoffments et Fayts*, 67. So it is where a lessee at will makes a lease for years, especially by indenture, it is a good

lease between them, and debt lies for the rent; and the lessee shall not avoid it but by an ouster by the first lessor, as 22 Hen. 7, 26, is. And JONES cited *Spark* v. *Spark*, Cro. Eliz. 676, where lessee at will made a lease for years, and he, being ousted by a stranger, brought an ejectment and recovered; and betwixt *Street* and *Virrall*, *ut supra*. And so it was resolved in this court, 28 Eliz. that an *ejectione firmæ* lies upon a lease made by a copyholder not warranted by the custom against any stranger; and the Year-Book of 12 Edw. 4, 13, is directly to the point: so here, when lessee for years enters according to the lease and pays his rent, the freehold betwixt them shall be in William Lord Effingham, who made the lease, and not in Humphrys, who is only lessee; and then the fine levied by the Earl of Nottingham and his son conveys well the freehold, and the uses are well raised upon this fine, and the jointure well settled; and then during her life the Earl of Nottingham hath no title to make a lease: wherefore the judgment ought to be reversed; and so much the rather for the great mischief which would ensue, if one who hath a tenant at will, who makes a lease for a small time, and the first lessor, not knowing thereof, levies a fine for a jointure for his wife, or to perform his will, or to other uses, &c. if he should be adjudged disseised, and as a disseisee to levy a fine which should tend to the benefit of the lessee for years, and be adjudged a disseisor against his intent or knowledge, as in this case is pretended, many should lose their inheritances. In many manors are divers tenants at will, where the father is tenant at will, and after him the son enters and occupies at the will of the lord, and is so reputed, and the lord allows them, and never accounted them as disseisors; if such tenants at will make under-leases for a year, or for half a year, if the lords of those manors levy fines of those manors, and this should tend to the benefit of the under lessees, who should be reputed to be disseisors without the intent of any of the parties, many lords should hereby be disinherited: whereupon they concluded, that Humphrys the lessee was neither disseisor nor tenant, but only William Lord Effingham, and he is the disseisor and tenant: and the fine levied by Charles Earl of Nottingham, and William Lord Effingham his son, is a good fine, and the uses well raised, whereby Elizabeth the wife of the said William Lord Effingham hath good title, and the defendant under her. Wherefore the judgment ought to be reversed.

But RICHARDSON, Chief Justice, argued to the contrary, and continued his former opinion, that Humphrys is the disseisor, and was tenant of the freehold at the time of the fine levied: and then the fine by the Earl of Nottingham (being a disseisee, and his son William Lord Effingham adjutor to the disseisin) shall inure to bar the right of the Earl of Nottingham, and for the benefit of the said Humphrys, according to the opinion in 2 Co. 56, *Buckler's Case*; and that he is a disseisor to the Earl of Nottingham, not at his pleasure, but *de necessario*; for a disseisin is a tortious ousting of any one from his seisin: and here this taking of the lease by Humphrys from Lord Effingham tenant at

will, and his entering by color of the said lease, is a disseisin. And here is an entry *usurpando jus alienum* without consent of the Earl of Nottingham: and as tenant at will may not grant his estate, as 27 Hen. 6, pl. 3, is, no more may he make an estate; and the Earl of Nottingham hath no election to say it is no disseisin. But he agreed to the case, where an infant makes a lease for years, reserving rent, and the lessee enters, the infant hath election to allow him to be his tenant, or to be a disseisor, which is most for his advantage: so where one enters and claims as guardian and occupies, the infant may allow him either disseisor or accomptant, which shall be for his best advantage.

Secondly, he held, that Humphrys is the sole disseisor and tenant of the freehold; for he, by his entry, did the sole act which made the disseisin: for the lease for years is merely a void contract; and when one enters by color of a void conveyance, he is the disseisor, as in *Crofts* v. *Howels*, Plow. 530, where a guardian assigned dower to a *feme* who is not dowable, and she enters, by her entry she is a disseiseress, 24 Edw. 3, pl. 43. If one enters by color of a void extent, it is at the peril of him who enters and takes the profits, to see by what right he enters. And he denied that the making of a lease for years, is either an express or implied command to enter or make a disseisin. And he denied that the making of a lease for years had gained the reversion to the lessor; but if lessee for years, or at will, makes a lease for life, or a gift in tail, he, by making livery, transfers the freehold, and gains to himself the inheritance, but by a nude and void contract he cannot gain the reversion. Whereupon he concluded, that Humphrys is the disseisor and tenant, and that the fine inures to the benefit of Humphrys, and not to the limitation of the uses in the indenture, because none of the parties had anything in the land at the time of the fine levied; and that the judgment ought to be affirmed.

But afterwards, for the reasons of us three, the judgment was reversed.

Note, Sir Robert Heath, Chief Justice of the Common Pleas, Crawley, Justice, Baron Denham, and Baron Trevor, agreed with this judgment in the King's Bench; and conceived, that it would be very mischievous if it should be adjudged otherwise. But Sir Humphry Davenport seemed to doubt whether the lessee for years ought not strictly to be taken for the disseisor and tenant.

TAYLOR d. ATKYNS *v.* HORDE.

King's Bench. 1757.

[*Reported* 1 *Burr.* 60.]

Ejectment. Sir Robert Atkyns was tenant for life, remainder to dame Ann Atkyns, his wife, for life; remainder to Sir Robert Atkyns (his eldest son by a former marriage) in tail male; remainder to Mr. John

Tracy, and his younger brothers successively, in tail male; remainder to Mr. Richard Atkyns and his heirs. Upon the death of Sir Robert the father, dame Ann his widow entered upon the lands. In Trinity Term 1710 an ejectment was brought in the Court of Common Pleas, against her Ladyship, by John Phillips, upon the several demises of Sir Robert Atkyns the son, and of Joseph Walker, to whom several terms of years attendant upon the inheritance had been assigned, in trust for Sir Robert the son. A verdict was found for the plaintiff, and he recovered *terminum suum predictum*, and had an *habere facias possessionem*. It is to be observed, that no account of the case states the grounds upon which this verdict was found for the plaintiff. Most probably it was merely in consequence of the terms of years which had been assigned to him. On the 1st of January, 1710, John Phillips, the plaintiff, surrendered the terms to Sir Robert the son; and on the 17th of the same month Sir Robert made a feoffment of the estates in question, with livery of seisin, to James Earle and his heirs. In the deed of feoffment it was declared, that the feoffment was made that James Earle might become perfect tenant of the freehold, in order for the suffering of a common recovery; which recovery, it was thereby declared, should inure to the use of Sir Robert Atkyns the son and his heirs. The recovery was suffered in Hilary term 1710. Sir Robert died on the 9th of November, 1711, without issue, and intestate. His nephew, Mr. Robert Atykns, was his heir at law. In Hilary term 1711 an ejectment was brought against him by Lady Atkyns; and in Easter term 1712 a general verdict was given for her. She died in the month of October following. Upon her death, Mr. Robert Atkyns entered, and continued in possession of the estate till the 16th of March, 1753, when he died, leaving issue only two daughters, Ann, the wife of Mr. Horde; and Elizabeth, the wife of Mr. Chamberlayne. The death of Sir Robert Atkyns the son without issue necessarily brought into question the validity of the recovery suffered by him; for if it were good, it destroyed his estate tail, and all the remainders expectant upon it; and Mr. Robert Atkyns, his nephew, and after his decease Mrs. Horde and Mrs. Chamberlayne, his only children, became entitled to the estates as his heirs at law. But if it were not a good recovery, then, upon the decease of dame Ann Atkyns, Mr. John Tracy became seised in tail of the lands devised by the testator's will, with the several remainders over. In the year 1752 an ejectment was brought against Mr. Robert Atkyns, and Mr. and Mrs. Horde, and Mr. and Mrs. Chamberlayne, by Cyprian Taylor, on the demise of Mr. John Tracy, who, in consequence of a direction contained in Sir Robert Atkyns the father's will, had taken the name of Atkyns. The jury found a special verdict.[1]

The case was argued four several times, — first by *Mr. Yorke* for the plaintiff, and *Mr. Knowler* for the defendants; again by *Mr. Pratt* for the plaintiff, and *Mr. Perrot* for the defendants; a third time by *Mr.*

[1] The statement of the case, from Butler's note to Co. Lit. 334 b, is substituted for that in the report.

Caldecot for the plaintiff, and *Mr. Serjeant Prime* for the defendants; and lastly by *Mr. Caldecot* for the plaintiff, and *Mr. Knowler* for the defendants.

Lord Mansfield now delivered the resolution of the court, having first stated the case and special verdict.

Sir Robert Atkyns the son being dead without issue male, the reversion in fee, devised to the lessor of the plaintiff, is come into possession: and consequently, he must be entitled to judgment in this ejectment; unless the defendants can set up a *bar* to his *right*, or to his *remedy* by an ejectment.

They set up a bar to *both*.

In bar of his *right*, they insist upon the *common recovery* suffered in Hilary Term, 9 Ann. A. D. 1710. In bar of his *remedy*, they insist upon the *Statute of Limitations*.

The *common recovery*, if duly suffered, certainly destroyed the *right* of the lessor of the plaintiff. The *Statute of Limitations*, if his title of entry accrued above twenty years before the 15th of December 1752, has certainly taken away the *remedy by ejectment*.

The merits therefore must depend upon two general questions.

1st. whether the said *common recovery* was *duly suffered?*

2d. whether this *ejectment* is barred by the *Statute of Limitations?*

As to the first, the objection is, that there was *not* a good *tenant to the præcipe;* for Lady Atkins, the widow of Sir Robert the father, had an estate for life in the premises; and did not join, by surrender or otherwise, in any conveyance of the freehold to James Earle, the tenant against whom the *præcipe* was brought.

The defendants contend that there *was* a good tenant to the *præcipe*, upon two grounds: 1st, because Lady Atkyns had no estate for life, and so Sir Robert the son was tenant in tail in *possession;* 2dly, suppose she had an estate for life, yet Earle was a good tenant to the *præcipe* by *disseisin:* which they endeavor to prove two ways, viz. 1st, that Sir Robert Atkyns, by his entry, was *himself* a *disseisor*, and by his feoffment, the 17th of January, 1710, conveyed the freehold he had *acquired by disseisin*, to James Earle; and, 2dly, suppose Sir Robert the son was not a disseisor, yet his said *feoffment was a disseisin*, and made James Earle a good tenant of the freehold *by disseisin*.

[Lord Mansfield proceeded to consider the first ground, and determined that Lady Atkyns had an estate for life.]

As the jointress clearly had an estate for life, *the next* ground is "That James Earle was a good tenant to the *præcipe* by *disseisin*."

The better to judge of this question, it may be proper to try to find out what the *old law* meant by a *disseisin* which constituted the tenant of the freehold, in respect of every demandant suing out a *præcipe;* although the owner's entry was *not* taken away: (for where the *right of possession* was acquired, and the owner put to his real action: *there* without doubt the possessor had got the freehold, though by wrong).

All the law concerning disseisins, which is any way applicable to the present inquiry, existed and was in use and practice *before* the assize of novel disseisin. The *assize* was introduced (probably from the usage of Normandy, for the Grand Coustumier treats of assizes) in or before the reign of Henry the 2d. Glanville, who wrote in that reign, calls the great assize a benefit "*clementiam principis, de consilio procerum, populis indultam*;" and the Mirror, fo. 93, says Glanville introduced it."

Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse.* Feud., lib. 1, tit. 25; lib. 2, tit. 1; 2 Craig., lib. 2, tit. 2.

Disseisin, therefore, must mean some way or other turning the tenant *out of* his tenure, and *usurping* his place and feudal relation. At the time I speak of, *no* tenant could alien *without license of the lord.* When the lord consented, the only form of conveyance was by feoffment publicly made, *coram paribus curiæ*, with the *lord's concurrence.* Homage, or fealty, was solemnly sworn; and suit of court and services were frequently done.

The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers.

The freehold *never* could be in *abeyance*; because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his *præcipe*. From the necessity of there being always a *visible* tenant of the freehold, and the notoriety *who* acted, and did suit and service *as such*, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*.

If the *disseisor died*, after one year's non-claim, the descent to his heir gave *him* the *right of possession*, and took away the true owner's entry. The Stat. of 32 H. 8, *c.* 33, requires five years' non-claim. The feoffee of a disseisor acquired title of possession, at the time I speak of, by one year's non-claim. The descent to *his* heir remains privileged as it was at common law; for the 32 H. 8, c. 33, extends not to any feoffee of the disseisor immediate or mediate. Co. Lit. 256 a. The *feoffee* of a disseisor was favored; because he came innocently in to the tenure, by a solemn and public investiture with the *lord's concurrence.*

But the Statute *Quia emptores terrarum* (which took away subinfeudations, and gave free liberty of alienation to the tenants of subjects, and to those who held of the King, as of an honor or manor) and other Statutes which extended the power of alienation to the King's tenant *in capite*; the frequent releases of feudal services; the Statutes of Uses, and of Wills; and at last the total abolition of all military tenures; have left us little but the names of *feoffment*, *seisin*, *tenure*, and *freeholder*; without any precise knowledge of the *thing originally signified* by those sounds; the idea *modern* times annexed to *freehold* or *freeholder*, is taken merely from the *duration* of the estate.

Copyholds, and the *customary freeholds* in the North, retain faint traces in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder, or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious, too, that *usurping* such copyhold or customary *tenure*, is a different fact from a *naked* possession, or occupation of the *land*.

But whoever will look into the practice of *other* countries, where tenures subsist with all the solemnities of feoffments and seisins, upon every change of a tenant by descent or alienation, and upon every usurpation of the real right; will easily comprehend, that at the time I speak of, it may be as notorious *who was the feudal tenant de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

Disseisin was a complicated fact, and differed from *dispossessing*. The *freeholder by disseisin* differed from a *possessor* by *wrong*. Bracton, c. 2, *De Assisa Novæ Disseysinæ*, fo. 160, puts many cases of possession wrongfully taken, which he calls *intrusion*; because there is no disseisin: "Possessio quæ nuda est omnino, et sine aliquo *vestimento*; quæ dicitur intrusio." *Vestimento* is seisin, investiture; (from whence the Saxon term *rest*;) a metaphor, the feudists took from clothing: by which they meant to intimate, "that the *naked possession* was *clothed* with *solemnities of the feudal tenure*." A particular tenant, according to feudal notions, was *in* as of the *seisin of the fee*, of which his estate was a part. If he aliened the fee, (which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held,) he forfeited his particular estate, for having betrayed his *seisin* with which he was intrusted: but on account of the *privity* and *confidence* between him and the reversioner, and the *notorious solemnity* of the act of investiture, *his* feoffment *disseised* the reversioner.

Bracton, who wrote in the reign of Hen. 3 (before tenants could alien without license), mentions the *disseisin* in this case, as a *necessary consequence*, and as a thing which *could not possibly be otherwise*: c. 3, *De Assisa Novæ Disseysinæ*, 161 b: "Item facit quis disseysinam, *cum quis in seysina fuerit* ut de libero tenemento et ad vitam, vel ad terminum annorum, vel nomine custodia, vel aliquo alio modo; *alium feoffaverit in præjudicium veri domini, et fecerit alteri liberum tenementum; cum duo simul et semul, de eodem tenemento et in solidum, esse non possunt in seysina*." He considers it as impossible for the true tenant not to be put out, when the other actually came into his place.

So late as the 32d of Eliz. in the case of *Matheson* v. *Trot*, 1 Leon. 209, the distinction upon which the judgment turns is, "That Henry Denny gained *a wrongful possession in fee*; but did *not* gain any *seisin*; so *no disseisor*: therefore the descent to his heir is not privileged."

Nobody can *disseise* the King; neither can any one be disseised to the use of the King. The King may be wrongfully *dispossessed*: but the intruder's injurious possession is *sine aliquo vestimento*, and called *intrusion*. The King cannot be made a disseisor; not because it is

wrong; for he may, in fact, withhold the possession of land from a subject contrary to right: but the reason seems, according to the feudal system, to be this: a subject never could stand in the King's *seisin* or *tenure*, and the King never could be in the *seisin*, *tenure*, or *feudal relation* of a subject. By that policy, all real property was held, mediately or immediately, *of* the King: in the King himself, all real property was *allodial*.

The precise definition of what constituted a disseisin which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was *once* well known; but it is not *now* to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded. For *after* the assize of *novel disseisin* was introduced, the legislature by many Acts of Parliament, and the courts of law, by liberal constructions in furtherance of justice, *extended* this remedy, for the sake of the owner, to *every* trespass or injury done to his real property; if, by bringing his assize, he thought fit to *admit* himself disseised.

It lay against advisers, aiders, or abettors, who were not tenants. Co. Lit. 180 b. It lay against the tenant who was no disseisor; as the heir of a disseisor, or his feoffee. Stat. Gloucester. It lay for the owner against the disseisor of the disseisor. The tenant's not being ready to pay a rent seek when demanded, was, for the benefit of the owner's remedy, a disseisin. Lit. § 223. It lay for outrageous distress. 2 Inst. 412. It lay against guardian, or particular tenant who made a feoffment, as well as against their feoffees. 2 Inst. 413. The Stat. of Westm. 2, c. 25, extends it to a man's depasturing the grounds of another; or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. Style, 407. If a guardian assigns dower to a woman not dowable, the owner may elect to make her a disseisoress. 21 Ed. 3. 13 (cited in Cro. Car. 203). In a word, for the sake of the remedy, as between the true owner and the wrong-doer to punish the wrong; and as between the true owner and naked possessor to try the title, the assize was *extended* to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments.

The reports of assize can only relate to cases where the owner *admits* himself disseised.

The law-books treat of disseisin, with a view to the *assize*, which was the common method of trying titles till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by Statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by *assize*.

These are the common places from whence many descriptions have been cited of a *disseisin*. But such authorities can give little light to the *present* question, which depends upon the nature of *such* a disseisin as made the disseisor tenant to every demandant, and freeholder *de facto*, *in spite of the true owner*. Yet the definitions in the books

(though very imperfect,) savor often of that which originally was an actual disseisin *in spite* of the owner.

Littleton, in § 279, defines disseisin with an etc. "Where a man enters into lands or tenements (where his entry is not congeable,) and ousteth him which hath the freehold, etc." The comment says, "*Every* entry is no disseisin, unless there be an *ouster of the freehold.*' And Co. Lit. 153 b, says, "*Disseisin* is putting a man out of *seisin*, and ever implies a wrong: but *dispossession* or *ejectment* is putting out of *possession*, and may be by right *or* wrong. *Disseisin est un personal trespass de tortious* ouster del seisin."

Though the *term* "*disseisin*," used, happens to be the same; the *thing signified* by that word, as applied to the two cases of *actual* disseisin or disseisin *by election*, is very different. This distinction of disseisin *at election*, is made in the case of *Blunden* v. *Baugh*, Cro. Car. 303, of which case we have seen a manuscript report, fuller than the printed one. The three judges, with whom agreed the four judges of the Common Pleas, argued and held "That the lessee for years of the tenant at will, was a disseisor at the *election* of the original lessor, for the sake of his remedy; but never could be looked upon as the freeholder or a disseisor *in spite* of the owner, or with regard to *third* persons." The manuscript report says, if a *præcipe* was brought against him, he might say "I am not tenant to the freehold." A variety of like cases are put in Cro. Car. (to which I refer). In the manuscript report there are more.

When the easy specific remedy was by *assize*, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a *disseisin*. So since an *ejectment* is become the easy specific remedy, he may elect to call the wrong a *dispossession*.

Where an *ejectment* is brought, there can be *no disseisin;* because the plaintiff may lay his demise when his title accrued, and recover the *profits* from the *time* of the demise. The entry confessed is previous to making the lease: but there is *no* real or supposed *re-entry*, after the *ejectment* complained of. If it was considered as a disseisin, no *mesne profits* could be recovered without an *actual* re-entry.

If the lessee for life or years makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver; or bring an ejectment, and *choose* whether he will be considered *as disseised*. *Metcalf on the demise of Kynaston* v. *Parry and Others;* a case reserved at Salop Assizes, 25th March, 1742, for the opinion of the Court of Exchequer; (who gave judgment in it, on the 24th of November, 1743,) was this: Tenant in tail of lands leased by his father to a second son, for lives, (under a power,) upon his father's death received the rent from the occupier, as owner and as if no such lease had been made during his whole life. He suffered a common recovery. It was holden "That this was only a disseisin of the freehold *at election*, and that therefore he could *not* make a good tenant to the *præcipe;*" and the recovery was adjudged *bad*.

Except the special case of fines with proclamations, (which stands entirely upon distinct grounds,) and the construction of the Stat. of 4 H. 7, c. 24, for the sake of the bar; I cannot think of a case where the true owner, whose entry is not taken away, *may not* elect, (by pursuing a possessory remedy,) to be deemed as *not* having been *disseised*.

The consequences of *actual* disseisins, considered *as such*, continue law to this day. The disseisee cannot dispose or devise: the descent takes away his entry. There are two cases cited in the case of *Blunden* v. *Baugh*, material to this point. *Pously* v. *Blackman*, B. R. Trin. 18 Jac. Rot. 1230; Palmer, 201, which is more fully stated in the manuscript report than in Croke. The case (in effect and operation) was this. Tenant at will made a lease for years: the original lessor devised. Though the lease by tenant at will, at the *election* of the original lessor, was a *disseisin*, yet they adjudged his devise good, because he had *not elected* to *admit* himself disseised; and by making a will, intimated the *contrary*.

Another case, (not in the report in Cro. Jac., but cited in the manuscript,) was in the 14th of Eliz. Sir Ambrose Cone, of his own head, entered into lands of Sir William Hollis, and paid Sir William afterwards, a certain rent, claiming to hold as tenant at will: and died. His heir entered: upon whom Sir William entered. It was adjudged "That at the *election* of Sir William Sir Ambrose was a disseisor: but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was *no disseisin*, and consequently the descent no bar to his entry."

In the case of *Pously* v. *Blackman*, Palmer, 205, it is said, "If a disseisee devise, and afterwards enter, the devise is good:" which Dodderidge denied, and said there must be a new publication. Which seems right, *if* there ever *was* a disseisin: for where an *actual entry* is necessary, it will not make good a conveyance made *before*; as was holden in B. R. et Dom. Proc. in the case of *Berrington* v. *Parkhurst*. The *actual entry could not support* the lease made *before*. Yet in Salk. 237, it is agreed, "The devise is good, because he was *seised ab initio*, so as he might bring trespass:" *i. e.* he *never* was *disseised* at all *by his election*; and he might make *that election* without an entry; he might bring his ejectment, he might bring trespass, *without* a re-entry. If it was not for this doctrine of *election*, what a condition would men be in!

In the case of *Pously* v. *Blackman*, there was *no entry*: and after much argument, it was at last resolved unanimously by the whole court, from the inconveniences which would be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, "*That the devise was good.*" And in the manuscript report where it is cited, one point said to have been resolved is, "That the owner, *by making a devise*, showed his *election not to be disseised*."

I will now consider whether James Earle can be deemed a good *tenant of the freehold by disseisin*.

Disseisin is a *fact*. It is *not found*; all the jury say is, "That soon after the judgment in ejectment, Sir Robert *entered and was in possession*." This must be taken to be an entry *in consequence of the judgment*. It was so considered upon settling the special verdict: otherwise the defendants have no case; for it is not found that Lady Atkyns was ever ousted, or quitted the possession, or that Sir Robert ever was seised.

Taking possession *under a judgment in ejectment*, never could be a *disseisin of the freehold*.

Suppose it a *real* proceeding — the termor of a disseisee might, at the old law, recover against the disseisor: he might recover against the feoffee of his lessor. But he never could thereby become a *disseisor of the freehold:* he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession inured always by *right*, and never by *wrong*. If the lessor had infeoffed, it inured to the *alienee;* if the lessor was disseised and might enter, it inured to the *disseisee;* if his entry was taken away, it inured to the *heir or feoffee of the disseisor*, who in *that* case had the right of possession.

Suppose the proceeding (as it is) a *fictitious* remedy. Then in truth and substance, a judgment in ejectment is a recovery of the *possession*, (not of the *seisin* or *freehold*,) without prejudice to the *right*, as it may afterwards appear, even between the parties. He who enters under it in truth and substance can only be *possessed according to right, prout lex postulat*.

If he has a freehold, he is *in* as freeholder. If he has a chattel interest, he is *in* as a termor; and in respect of the freehold, his possession inures *according to right*. If he has no title, he is *in* as a trespasser; and without any re-entry by the true owner, is liable to account for the profits.

It is found, that the ejectment was brought by Sir Robert Atkyns, to recover the *possession:* but it is not found that he claimed the *freehold*.

The title must *now* be taken as in *this special verdict*. Therefore it appears he had *no right* to the *possession*. His *feoffee* could be in no other condition than *himself:* he had a possession without prejudice to the *right;* and could convey *no other*. He was not *in* as a particular tenant; — there was no privity of any seisin; — he had only a *naked* possession.

But the case is still stronger. The true owner cannot even elect to make a person in possession *under a judgment in ejectment* a *disseisor*. He could not bring an assize of *novel disseisin:* the entry is *not injuste et sine judicio;* but *under* authority of a court of justice, and lawful; therefore not liable to punishment by fine, (as every disseisin was.)

The true owner may enter upon a disseisor: but after a judgment in ejectment, an actual entry would not be permitted. If there *had*

been any election in this case: the true owner elected "*not to be disseised*," and recovered by ejectment: which if there had been a disseisin, would have purged it.

But there is still behind, (though it happens not to be necessary,) a *larger ground*, upon which to determine this question: and more satisfactory, because more intelligible, from the *nature of a common recovery now*, and a feoffment to make a tenant to the *præcipe*, with *that* view *only*.

The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually inalienable. The utility of the *end* was thought to justify any *means* to attain it.

Nothing could be more agreeable to the *law of tenures*, than a male fee inalienable. But this bent "to set property free" allowed the donee, *after* a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the *Statute de Donis* repeated what the law of *tenures* said before, "that the tenor of the grant should be observed;" than the same bent permitted tenant in tail of the freehold and inheritance, to make an alienation *voidable* only under the name of a *discontinuance*. But *this* was a small relief.

At last, the people having groaned for two hundred years under the inconveniences of so much property being inalienable; and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the *legislature*;—the same bent threw out a *fiction* in *Taltarum's Case*; by which tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely.

Public utility adopted and gave a sanction to the doctrine, for the *real* political reason, "to break entails:" but the *ostensible* reason, "from the fictitious *recompense*," hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention. Till at last the *legislature* applauded common recoveries, and *lent their aid* by the Acts of 11 H. 7, *c.* 20; 33 H. 8, *c.* 31; 34 and 35 H. 8, *c.* 20; 14 Eliz. c. 8; and lately 14 G. 2, *c.* 20 (which is a retrospective and declaratory law, and seems to have restored the original tenant to the *præcipe*). Before the Statute of *Quia emptores terrarum*, *subinfeudations*, whereupon rents and services were reserved, did not prevent the *præcipe's* lying against the freeholder of the seigniory. When common leases to farmers, for one or more life or lives, reserving rent, came in use; they for that purpose *resembled subinfeudations*, and ought not to prevent the *præcipe* being brought against the owner of the freehold, under which such leases were granted.

As the *legislature* has for ages *avowed* the proposition, we may *now* say "that common recoveries are a mere *form of conveyance*." All necessary circumstances of form and ceremony are taken from its fictitious original.

The policy of *this species* of alienation meant to take a *middle* way as to entails, between perpetuities and absolute property.

Alienations were *allowed*, yet in such a shape as necessarily required *deliberation* and *delay*; and they were only allowed to be made by tenant in tail in *possession*; or by tenant in tail in remainder, *with consent* of the owner of the first estate for life. The eldest son was restrained in the lifetime of his father or mother, or any other ancestor or relation, seised for life under a family settlement.

The Act of 14 G. 2 proceeds upon the parties to a recovery having *power to suffer it*. Sir Robert Atkyns the son had *no* right to suffer a common recovery, without the *concurrence* of the jointress. Any contrivance to do it *without* her joining, is artifice and evasion.

If tenant in tail in possession is disseised, though the *præcipe* be brought against the disseisor, yet, if *he* is vouched, the recovery shall bar; because *he* had *power to bar*.

In *Lincoln College Case*, 3 Co. 59, the judges support the collateral warranty of Sibil; *because* she and Edward had *power to bar*.

In *Jenning's Case*, 10 Co. 44, the recovery is supported, *because* the parties had *power*.

By parity of reason, *this* recovery ought not to be supported, *because* the parties had *no* power: if it was, the law must be overturned.

Every remainder-man in tail might easily get a *naked* possession, and make a *secret feoffment*.

The plan of marriage and other family settlements, is "to limit a remainder to the first and every other son in tail." The *negative* which the father now has upon the eldest son's suffering a common recovery, is the very *means* and *consideration* of getting the estate re-settled upon the marriage of the eldest son. By *this* method, the moment he attains to the age of twenty-one years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. *This consequence alone*, in a case *unprecedented*, is a sufficient objection.

When a termor, after the 4th of H. 7th, made a feoffment, and levied a fine with proclamations, and insisted upon five years non-claim; the judges, with strong sense, said, though a feoffment by tenant for life, or years, or at will, is a disseisin, it shall *not* operate as a disseisin, to enable the *termor himself* to bar the inheritance, by a fine with proclamations according to the 4th H. 7, *c.* 20. For, say they, "it was never the intent of the makers of the Act, that those who could not levy a fine, should, by making an estate *by wrong and fraud*, be enabled to bar those who had right. For if they themselves, *without such fraudulent estate*, could not levy a fine to bar them who had the freehold and inheritance; certainly the makers of the 4th of H. 7, *c.* 20, did not intend that by making of an estate *by fraud and practice*, they should have power to bar them: and such *fraudulent* estate is as *no* estate in the judgment of the law." So say I, in the present case. It was never the intent that those *who could not suffer a recovery* should,

by making an estate *by wrong and fraud*, be enabled to bar those in remainder or reversion who had a right. For if they themselves, *without such fraudulent estate*, could not suffer a recovery to bar those in remainder and reversion; certainly the framers of this qualified species of alienation did not intend, that by making an estate *by fraud and practice*, they should have power to bar them: and such *fraudulent* estate is as *no* estate in the judgment of the law.

The judges then put many cases, where a recovery in dower, or other real action; a remitter to a feme-covert, or an infant; a warranty; a sale in market overt; the King's letters patent; a presentation; an administration;—in short, all acts temporal and ecclesiastical, shall be *avoided by covin*: and from thence argue that a fine which the parties had *no power to levy directly*, shall not be supported *indirectly* by covin. So argue I, in the present case: a common recovery which the parties had *no power* to suffer *directly*, shall *not* be made good *by wrong and fraud*.

In the spirit of the makers of the 14 G. 2, I say the parties to this recovery had *not* power to suffer it: *therefore* it is *substantially bad*.

This is *not* the case of a feoffment to a *third* person for *his own* benefit: it is, in effect, to the use of Sir Robert, the *wrong-doer himself*. The law considers a *feoffee to the intent to be tenant to the præcipe* as a *mere instrument* for *one* purpose of *form only*. His wife shall *not* be endowed: his Statutes or judgments shall *not* affect the land; if he had a term for years, it shall *not* merge. Let me appeal then to the oldest authorities, in those times when the solemnity and notoriety of feoffments, and the feudal veneration in which they were held, gave them all that wonderful efficacy we read of: could a man by *his own injurious* feoffment have acquired an advantage to himself? Littleton shall answer: he tells us what was established long before he wrote. Litt. § 395. "If a disseisor enfeoff his father in fee, and the father die seised of such estate, by which the lands descend to the disseisor as son and heir, &c.; in this case, the disseisee may well enter upon the disseisor, notwithstanding the descent: for that as to the disseisin, the disseisor shall be adjudged in *but as a disseisor*, notwithstanding the descent; *quia particeps criminis*."

After the Statute *De Donis*, tenant in tail in remainder, with the *concurrence* of the freeholder, might make a *voidable* alienation by *discontinuance*: but he could not acquire to himself that privilege by an *injurious* entry and feoffment. "He in remainder in tail disseises tenant for life, and makes a feoffment, and dies without issue, and the tenant for life dies: he in reversion may enter: it is no discontinuance." Co. Lit. 317 a. b. It is no disseisin of the reversion. "If remainderman for life disseise the immediate tenant for life; after the death of the immediate tenant, he is *in* as tenant for life." Neither should a reversioner, by an injurious entry upon the tenant for life, be, in respect of strangers, allowed to transmit to his heir the privilege of

descent. If the reversioner disseises tenant for life, and dies seised; the descent shall not take away the entry of a stranger. Hob. 323.

From the whole, we may conclude — *If before* the introduction of common recoveries as a conveyance, this question had been agitated in an *adversary* real action, upon a plea "that Earle was not tenant of the freehold;" it would have been adjudged, from the law and artificial learning of tenures, "that he could *not* be so considered." *If* the question had been, Whether tenant in tail in remainder should, by such *injurious* entry and feoffment, acquire a *benefit to himself*, to the *prejudice of his reversioner?* it would have been adjudged, from eternal principles of justice, "that an act founded in wrong should *not*, by *virtue of the crime itself*, become legal, for the *author's advantage*."

As it is *now* agitated, when common recoveries are established, as a *species of alienation;* — the only question is, "Whether the *rule* of law which *requires the concurrence* of the owner of the first estate for life, shall be *overturned?*" 'Tis better to subvert the rule directly, than suffer it to be done by a *secret injurious* entry and feoffment; which cannot be prevented, and which the owner may never hear of.

There is no injury or wrong for which the law does not provide a remedy. But if this stratagem should prevail, redress must follow *too late;* unless the entry of the tenant for life shall *avoid* the recovery. If it would, there is an end of the present question: for the jointress entered, and was entitled to the profits from Sir Robert Atkyns as a trespasser *ab initio*.

In *every* light, and upon *every* ground of law, this recovery is *bad*.

As there is no bar to the *right* of the lessor of the plaintiff —

The second general question is, "Whether the lessor of the plaintiff is, by the *Statute of Limitations*, barred from recovering in *this ejectment?*"

[This question was then considered, and decided in the affirmative.]

Therefore we are all of opinion that there should be

Judgment for the defendants.[1]

[1] A writ of error was brought in the House of Lords, and the judgment of the Court of King's Bench was affirmed, on the ground that the plaintiff was barred by the Statute of Limitations.

See s. c. on another ejectment, Cowp. 689 (1777).

"The great point for the decision of the court was, *What estate in the lands a feoffor must have to give the feoffment efficacy.* It seems to be admitted by the court, in the case referred to, that, *originally*, no greater estate was required to be in the feoffor than mere possession. This they attribute to the solemnities originally attending both the admission of tenants into the tenure, and the transfer of the fee. But it seems to be their opinion, that, since most, if not all, of these solemnities have been dispensed with, the peculiar efficacy of a feoffment has been lost. This has certainly been the case in one very remarkable instance. Lord Chief Baron Gilbert, in his Treatise of Tenures, p. 43, observes, that Lord Coke says, 'that the feoffee of the disseisor that comes in by title, after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because the feoffee came in by title; and for quiet of purchasers, this non-claim for a year and a day was held a dereliction. Hence, writs of entry against the feoffee in the *per* and *cui*. But this

DOE d. SOUTER *v.* HULL.

KING'S BENCH. 1822.

[*Reported* 2 *Dowl. & R.* 38.]

EJECTMENT [on the several demises of John Souter and George Chatfield and Elizabeth his wife] to recover the possession of certain freehold lands and premises situate at Midhurst, in Sussex. At the trial before *Park*, J., at the last assizes for the County of Sussex, the case was this: Henry Souter, the father of the lessor of the plaintiff John Souter, being seised in fee of the premises in question, made his will,

was not held so in respect of disseisors, because they themselves, being the wrong-doers, had no law in their favor, lest it should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the lord, then they thought it too hard such feoffments should alter the right of possession, and therefore they construed the feoffee, that came in by his own act, to be a wrong-doer, and not to alter the right of possession; but the heir, for the reasons aforesaid, was left as before.' But it will be difficult to find another instance in which feoffments have lost their efficacy. The arguments brought to prove that they have lost their efficacy in creating an estate of freehold, when it is not in the feoffor at the time of the feoffment, are, 1st, that livery is not made now with the solemnity with which it was made formerly; 2dly, that the passages in the books which speak of feoffments by tenants for years, and others having estates less than freehold, creating estates of freehold in the feoffee, by disseisin, are to be understood as referring only to a disseisin by election.

"*As to the first argument*, — It seems to be everywhere admitted, that the feoffments we are speaking of, *once* had the operation and efficacy in question; and that this operation and efficacy is ascribed to them in numberless passages in our law books; so that the great, if not the only, difficulty is to show, that, at the time when it is universally agreed feoffments had this operation and efficacy, they were made with no other forms and solemnities than those with which they are made now. It is certain, that the custom of making livery before the peers of the court, and recording the entry of the feoffee in the records of the lord's court (if it were ever absolutely necessary), was disused very soon after the Conquest, and was fallen completely into disuse at so early a period as that of Henry II.: so that in this reign, and from thence to the present time, no other ceremony in making feoffments was used than that which is now practised, of the feoffor and feoffee coming upon the land, either in person or by attorney, and there the feoffor, in the presence of witnesses (all other persons being out of the hall) delivering the possession of it to the feoffee. The form of making feoffments in the reign of Henry II. is minutely described in Bracton, lib. 2, cap. 18, fol. 39 b. 'Item, non valet donatio, nisi subsequatur traditio, . . . tunc demum, cum donator plenam fecerit et eam donatorio per se vel per suos fuerit, vel per procuratorem et literas, si absens fuerit, ita quod charta donationis et literæ procuratoriæ coram vicinis, ad hoc specialiter convocatis, legantur in pleno, et etiam cum donator corpore et animo recesserit a possessione.' This is the account given by Bracton of the mode of making feoffments in his time. He makes no mention of the presence of the *pares curiæ* being necessary, or of its being necessary to record the entry of the feoffee in the lord's court, or of any other ceremony besides those now practised. Hence we find that the account given by Sir William Blackstone, book 2, chap. 20, pp. 309-315, Archbold's ed., of the present mode of making feoffments, is no more than a transcript of the passage cited above from Bracton. The next thing to be shown is, that as the ceremony of

bearing date the 12th of June, 1788, by which he gave the same to his wife in these words, "I give to my loving wife Mary Souter all my household goods and chattels, and I give to her a barn and piece of free land at Midhurst, in Sussex." On the 7th of October, 1790, the

making feoffments has been the same during all this period, the courts of judicature, and the writers upon our laws, have, during all this period, agreed in ascribing to them the effect and operation in question. Their language in this respect is perfectly uniform, that no freehold is required in the feoffor, and that however tortious or slender his possession may be, his feoffment, necessarily and unavoidably, gives an estate of freehold to the feoffee. Nothing can be more decisive on this subject than the following passages transcribed from Bracton: 'Poterit autem res esse omnino aliena et ex toto, quantum ad jus et proprietatem, et feodum, et liberum tenementum, usum-fructuum, et nudum usum; et aliquis ponerit se in seysinam, per dissesysinam, vel per intrusionem, cum forte invenerit rem vacantem. Et si talis, dum ita fuerit in seysina, donationem fecerit, valebit quantum ad ipsum, et feoffatum suum, et alios, qui jus non habent, ut prius dictum est, donec per illum, qui jus habet, revocetur. Item poterit esse aliena, quantum ad omnia prædicta, et alicujus in possessione existentis, quoad nudum usum, vel quoad hoc, quod servitutem habeat in re, quoad usum fructuum percipiendum, sive ad certum terminum vel ad voluntatem. Item quoad hoc, quod habeat custodiam, vel curam, vel hujusmodi; in quibus casibus, si dum sic fuerit in seysina, quali quali, donationem fecerit, statim fit res data accipientis, quoad dantem et accipientem, et quoad alios, qui jus non habent. Sed quoad verum dominum, nunquam erit liberum tenementum, nisi ex longa et pacifica seysina, et unde si incontinenti post tale feoffamentum posset verus dominus ponere se in seysinam, omnes quoscunque tenere posset exclusos a possessione. . . . Sed quid dicetur de eo qui nullam omnino seisinam habuit, nec aliquam juris scintillam, si donationem fecerit de re quam alius tenet, per se ipsum vel per alium nomine suo, non faciet rem accipientis, cum ipse nihil teneat, quia non potest plus juris ad alium transferre quam ipse habet, nec plus valebit ista donatio quem valeret, si aliquis transiens per aliquod manerium ab aliquo possessum, diceret socio suo viatori, do tibi tale manerium quod talis possidet, quia nihil aliud esset dicere, quam dare ei plenam pugnatam ex nihilo, cum possessio non sit vacua.' Bract., lib. 2. *c.* 14, fol. 31 a, 31 b. So in another place: 'Item licet liberum tenementum non habuerit, donationem potest facere quis, dum tamen in seisina fuerit aliqua justa de causa, sicut ad terminum annorum, vel ratione custodiæ. Idem erit, si nullam justam causam habuerit, ut si per intrusionem vel disseisinam; et cum sit in seisina aliis donare poterit, licet non cum effectu et aliis per donationem facere liberum tenementum, quod quidem ipse non habuerit.' Ibid., lib. 2, *c.* 5. § 4, fol. 11 b. It seems to be clear from these passages, that in Bracton's time, every person who had the possession, however slender his possession might be, as termor for years, tenant at will, or guardian; or however tortious his possession might be, as a disseisor or intruder; was nevertheless considered to be *in* the seisin of the fee, and might by livery transfer it to another. Bracton frequently repeats this doctrine, and illustrates it by many examples in the course of the second book. — Such is the account given by Bracton of the operation of feoffments; and as the account given by him of the *form* of feoffments has been contrasted with the account given of it by Sir William Blackstone, the reader is desired to contrast the above account given by him of the *operation* of feoffments with the account given of it by Sir Edward Coke, *ante*, 48 b, and 49 a. He expresses himself to the same effect in his 2d Inst., fol. 413. Commenting on the Statute of Westminster 2, cap. 25, he observes, that though the Act speaks of an alienation by feoffment by a tenant for years, yet it extends to tenants by statute-merchant, statute-staple, tenant at will, and tenant by sufferance; because all these have a possession. But he observes, that it is otherwise of a bailiff, for he has no possession at all. — Several other authorities will be offered to prove this point in a subsequent part of this note; one more authority only shall be mentioned here. Mr. Knowler, in his argument for the defendant in the case above referred to, seems, with reason, to lay great stress upon it

testator died seised, leaving John Souter, who claimed to be his eldest son and heir-at law, and his said wife, him surviving. On the 9th of October, 1794, the widow and John Souter jointly conveyed the premises to Christopher Hull, the father of the defendants, by deed of

15 & 16 Ed. IV. 8, 9. In trespass, the defendant said, that one M. was seised in his demesne as of fee, and leased to him for his life. The plaintiff said, that long before M. had anything in the land, D. was seised in fee, and leased to E. for life; that D. died, and the reversion descended upon Jane his daughter, who married M.; that M. granted the reversion to the defendant for life; that the tenant attorned; that M. died, and then Jane granted the reversion to the plaintiff, and the tenant attorned; whereupon he (the plaintiff) entered, and was seised till the defendant made the trespass without this, that M. whom the defendant supposes to have leased to him, was seised in his demesne as of fee. It is to be observed, that the leases mentioned here, being for lives, were necessarily created by livery. The question before the court therefore was, Whether want of seisin in a feoffor was a good plea? All the judges held it was not; and that the plaintiff should have pleaded generally *as feoffee*. And Littleton expressly says, that if a man pleads a feoffment, it is no plea to say that the feoffor had nothing at the time; he can only plead *nient dedie pas*. — Here then we have the most decisive evidence, that from the reign of Henry II. to the present time, the courts of judicature and the writings of the professors of the law are perfectly agreed, in considering feoffments as made with the same ceremonies, and attended with the same efficacy and operation. It follows from this, that it can be no argument against their having the efficacy and operation contended for in the particular instance now in question — that at a period anterior to that mentioned here, they were made (if that really was the case) with more notoriety and ceremony than they are now.

"As to *the second argument*, — that the passages in the books which speak of tenants for years, and others having estates less than of freehold, creating estates of freehold in the feoffee by disseisin, are to be understood as referring only to a disseisin by election, — Lord Mansfield, on his entering into this part of the argument, observes, that the precise definition of what constituted that disseisin, which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but that it is not now to be found. Most unquestionably there are many cases in which it would now be difficult, perhaps impossible, to say with certainty, whether they amounted to an actual disseisin, according to the doctrine of the old law; yet surely many cases may be stated, which by the most conclusive and satisfactory reasoning may be shown to be actual disseisins, according to that law. Perhaps the following observations may serve to establish a general rule for distinguishing those acts which amount to actual disseisins from those which are such only at the election of the party. By a disseisin at the election of the party is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised, may, if he pleases, consider as *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election, is no disseisin till the party in question, by his election, makes it such. It follows, therefore, that every act which is said by the writers to produce an immediate disseisin, necessarily implies an actual disseisin. Now we find, that the disseisins produced by feoffments naturally gave the feoffee against every person but the disseisee, an *immediate* estate of freehold, with all the rights and incidents annexed to it. To this effect Bracton writes, lib. 2. ch. 5. § 3. fol. 11 b. 'Item valida poterit esse donatio *statim ab initio* inter quascunque personas, et invalida et ex post quantum ad alias personas, ut si quis rem alienam dederit alicui, ut supra dictum est.' Hence we find everywhere, that the wife of the feoffee became *immediately* entitled to her dower; the husband of the feoffee became *immediately* entitled to his curtesy; and the descent upon the heir of the feoffee *immediately* took away the entry of the disseisee. This is the constant language of the books, when they speak generally of disseisins. Now the books make no difference, whether the feoffment is made by a person seised of an estate of freehold, or

bargain and sale, who took possession and remained undisturbed therein till July, 1814, when he died, leaving his will, whereby he demised the premises to the defendants, in equal moieties. Whether Souter was, in fact, the eldest son and heir-at-law of the testator Henry Sou-

by a person having only the bare possession, as tenant for years, at will, or by sufferance. The description given by Bracton in the passages cited from him, answers every notion given by Lord Mansfield of an actual disseisin. Bracton says, that immediately upon the feoffment the estate becomes the property of the feoffee, as between him and the feoffor, and every other person, except the rightful owner; that a long and uninterrupted possession of a certain duration, will make the title of the feoffee good even against the rightful owner; that, to prevent this, the donor must restore his own seisin. Here, then, is what his lordship so justly considers as necessarily requisite to form an actual disseisin, — a person who has expelled the tenant from his fee, and usurped his feudal place and relation; a tenant to the *præcipe* of every demandant, though the true owner's right of entry upon him is not taken away. If the feoffee in this case were only a disseisor at the election of the disseisee, it would follow, that he was not a disseisor till the right owner made him such by his election, and therefore, that the fee would not be in him, if the rightful owner did not elect to make him a disseisor. According to this doctrine, if the feoffee of tenant for years, or any other person making a feoffment without an estate of freehold in him, died in the life of the rightful owner of the estate, the estate would not be subject to dower or curtesy, nor would the entry of the rightful owner be taken away. But we find, that in all cases in which our law-writers treat of disseisins made by feoffments, they consider it as a matter of course, that the estate of the feoffee, immediately, became an estate of freehold, with all the qualities and rights of a freehold estate annexed to it. A similar argument lies from the relation in which such a feoffee stood with respect to strangers. Bracton observes, that he immediately acquired the seisin of the fee as against strangers; which could not be, if he were only a disseisor at the election of the party. It has been observed before that the books make no difference between feoffments made by persons having estates of freehold, and feoffments made by persons having estates less than freehold. Bracton expressly mentions guardians, tenants for years, by sufferance, at will, by disseisin, or intrusion, as persons whose feoffments are attended with the effect described above. So does Sir Edward Coke, in the passage cited from the Second Institute. So Perkins, § 222: 'If lessee for years enfeoff a stranger, the lessor being upon the land, yet the land shall pass by the feoffment; but perhaps, if he continues upon the land, claiming the same after the feoffment, this countervails an entry for a forfeiture: and the reason why it passed by such a feoffment, is because the lessor had nothing to do, to meddle with the possession of the land during the term.' So Dyer, 362 b. A termor for a thousand years made a feoffment, by the words *dedi, concessi, et feoffavi*. It was made a doubt, whether the lands passed by the feoffment, so that the lessor might enter for the forfeiture; or whether the term passed by the first words. The very doubt shows that it was taken for granted, that without those words the freehold would vest in the feoffee. In the margin of that case, in the edition of 1688, it is said, that in the case of *Read and Morpeth* v. *Errington* (reported in Cro. Eliz. 321) it was held, that the lessee for years might make a feoffment, notwithstanding the presence of the lessor, and that it was a forfeiture of the lease; for though the lessee had the possession and might dispose of it, yet the lessor might enter for the forfeiture. Thus, in the case of *Blundell* v. *Brook*, Sir William Jones, 315, the judges held, that when tenant at will makes a lease for years rendering rent, and the lessee enters and pays rent, that is no disseisin, but at the election of the first lessor; for, say they, it never shall be a disseisin, unless there be the claim of a stranger by entry to have the freehold, or unless the owner of the land waives the occupation of the land, or brings an action, or otherwise declares his intention that he takes it by disseisin. Here the two kinds of disseisin are contrasted in the most direct and positive manner. The judges also, in the case of *Blundell* v.

ter, whom he survived, but he did not join in the conveyance to Mr. Hull. On the 6th of November, 1810, Whicher Souter made his will, by which he bequeathed all his real estate to his wife Elizabeth Souter, and his brother John Souter (the party who joined in the conveyance

Joseph, cited *Matthew Taylor's Case*, 34 Eliz. C. B. Tenant at will, or for years, makes a feoffment in fee, and dies, his wife brings dower against the feoffee, who pleaded *ne unques accouple en loyal mariage*, but the whole court was against him; for in the instant the fee was gained. In Cro. Jac. 615, and *contr.* 31 b, that doctrine is controverted, on the ground that the seisin of the feoffee was but momentary: but this proves the position attempted to be established here; for if the feoffment in this case only gave a freehold at the election of the reversioner, the feoffee had no seisin. The same doctrine seems to be laid down very expressly by Lord Hardwicke, 2 Ves. Sen. 481. Having occasion to mention a fine levied by tenant at will, he says, 'If they meant a wrong thereby, they must have taken another method; as this could not work a disseisin on the trustees, and turn their estate to a right, while they were tenants at will to the trustees. This way, indeed, they might do it, according to the distinction taken in several cases, particularly in Dormer and Parkhurst, if they executed a feoffment on the land; because it is a feoffment on livery, which is a notoriety to the trustees, and puts it on them to make entry to avoid.' In the same manner, 3 Atk. 339, his lordship says, 'If a man enters on my tenant, he does not gain such a possession to levy a fine thereon, unless he continues in possession: for a wrongdoer, to gain a possession by disseisin, must not step on the land, and withdraw and leave the rightful owner in possession, which would be sufficient to gain a seisin on a feoffment, but not to levy a fine.' — In every stage of our law, the most modern as well as the most ancient, the peculiar operation of a feoffment, as to the divesting of estates, destruction of contingent remainders, and extinction of powers, has been recognized. Citations and arguments to prove the point before us might be easily multiplied; but they shall be concluded here, by some observations upon the allowed effect of a fine levied by a tenant for years, or even by a tenant at sufferance, who has previously made a feoffment. No point of our law is more clearly settled, than that, unless some one of the parties to a fine has an estate of freehold in the lands, of which it is levied, it is totally void, as to all strangers, and may be avoided at any time by the plea, *quod partes finis nihil habuerunt*. Now, supposing a tenant for years to make a feoffment, and the feoffee afterwards to levy a fine, it is clear that the fine would be without effect, unless the feoffment gave him an estate of freehold. In the case of *Whitby* v. *Tounsend*, 1 Vent. 241; Sir Thomas Raymond, 219; 2 Lev. 52, it was settled, that where a fine is levied in this manner, the fine will bar the lessor at the end of five years after the expiration of the term. This would never be the case unless the feoffment had previously created an estate of freehold. — In the case of *Doe* v. *Fraser*, Cowp. 217, Lord Mansfield expressed himself as follows: 'It is very true that I told the jury, they were warranted by the length of time in this case, to presume an *adverse* possession and *ouster*, by one of the tenants in common, of his companion: and I continue still of the same opinion. Some ambiguity seems to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over *adversely* without a title. If he does, such holding over under circumstances will be equivalent to an *actual ouster*. For instance, length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title. But if tenant *pur autre vie* holds over for twenty years after the death of *cestuy que vie*, such holding over will be *adversely* to the remainder-man or reversioner; because it was *adverse* to his title. So in the case of tenants in common: the possession of one tenant in common, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he

to Mr. Hull), upon trust to make an inventory thereof, and first, by sale of part, to pay his debts, &c., the residue to his wife for life, or while she continued his widow, and upon her death, or marriage, to his children, share and share alike. Whether Souter died shortly after making

acknowledges him co-tenant: nor indeed is a *refusal* to *pay* of *itself* sufficient, *without denying* his *title*. But if, upon demand by the co-tenant of his money, the other *denies to pay*, and *denies his title*, saying he claims the whole and will not pay, and continues in possession, such possession is adverse, and *under* enough.' By the adverse possession mentioned in this case, his lordship never could mean a disseisin at the election of the party. What is there to distinguish it from an actual disseisin? — Upon the whole, therefore, it is submitted to the learned reader's consideration, 1st, that, as feoffments have not been made from the reign of Henry II. to the present time, with any other solemnities than those with which they are made at present, every operation and efficacy which has been constantly and uniformly allowed or ascribed to them by the courts of judicature, or writers of authority contemporary with or subsequent to that monarch's reign, down to the present time, ought, notwithstanding the objection that they are not now made with some of the solemnities with which they are said to have been made in their very earliest institution, to be allowed and ascribed to them now; 2dly, that by the passage cited from Bracton, and the other authorities cited or referred to in the course of this note, it appears, that the disseisin produced by feoffments must be understood to be an actual disseisin, and not a disseisin merely at the election of the party; 3dly, that in many of these authorities it is most expressly mentioned, and that in all of them it must be implied, that however slender, bare, or tortious the possession of the feoffor is, his feoffment necessarily and unavoidably vests the freehold in the feoffee, till the disseisee by entry or action restores his possession; 4thly (to apply this abstruse and antiquated learning to the present subject-matter of business), that copy-holders, tenants for years, by *elegit*, statute-merchant, statute-staple, at will, or by sufferance, are all considered to have the possession of the estate, and that they may by feoffment vest an actual estate of freehold in the feoffee; 5thly, that a fine may be levied of, or a common recovery suffered upon, this estate of freehold; 6thly, that the feoffment so executed, the fine so levied, and the recovery so suffered, are immediately good against every person except the rightful owner; and 7thly, that in process of time they become good against the owner himself. — To ascertain the exact period of time when such feoffments, fines, and recoveries, will be a bar to the rightful owner, would be too great an extension of this note, the length of which already requires an apology.

"*As to the opinion of the court*, — that the feoffment of Sir Robert Atkyns was founded in fraud, and was therefore void; it is to be observed, that however that reasoning applied to the particular case before the court, it does not apply to the general question discussed in this note, which presupposes previous possession in the feoffor, free from every circumstance of fraud; either fair and innocent, or acquired by the open and notorious circumstances of disseisin, abatement, intrusion, or deforcement. Sir Robert Atkyns acquired his possession by the entry made by him under the verdict obtained by him in 1710. He lost it by the verdict given for Dame Ann Atkyns in 1712. It may, therefore, be said (and the fact really was), that he obtained the verdict given for him in 1710, and consequently the possession under it, by a *pretended* title. He had not a fair or innocent possession. He did not acquire his possession by disseisin, intrusion, abatement, or deforcement; it did not descend upon him; it did not come to him by act of law; he was not in the seisin of the fee by virtue of any gift or demise from the freeholder: he obtained his possession by the judgment of a court of law, under the color of a pretended title. Thus, in the language of the law, his original possession was founded in fraud, practice, and stratagem. And to use an expression of the judges, 3 Rep. 78 a, 'the common law does so abhor fraud and covin, that all acts, as well judicial as others, which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful.' —

this will, and in 1803 his widow married the lessor of the plaintiff, George Chatfield. Upon this case it was contended, that the lessors of the plaintiff were entitled to recover the premises, as devisees in trust under the will of Whicher Souter, the heir-at-law of Henry Souter, the original testator, and that the defendants must resort to their action against John Souter, the party to the conveyance to Mr. Hull, upon the deed. For the defendants three objections were taken. First, that as Whicher Souter was not in possession when he made his will, he could not devise a right of entry; second, that the realty did not pass under his will, the language of it being clearly referable to personal property only; and third, that as Mr. Hull had maintained an adverse possession for twenty-two years, and had died so adversely possessed, and had bequeathed the estate to his children, a descent was cast. The learned judge, however, was of opinion that the lessors of the plaintiff had shown a good title, and directed the jury to find a verdict for the plaintiff, reserving the points of law raised for the defendants, with liberty

From the reports of the case of *Taylor* v. *Horde*, it appears that Lord Mansfield laid great stress on the resolution of the judges in *Fermor's Case*. In this case, Thomas Smith being seised in fee of several lands, and holding others by copy of court-roll, and others for a term of years, and others at will (all of them lying in the same vills), made a feoffment with livery of all those held by copy, for years, and at will, to one Chappell, for life, and afterwards levied a fine. The question was, Whether the fine was a bar to the owners of the fee, at the expiration of the first five years? It appeared that Smith continued in possession of the land, and paid the rents. See 3 Rep. 77; 2 Anderson, 176; Cary, 29. The judges were of opinion, that the feoffment was fraudulent. Upon an examination of the different reports of the case, it will be found, that his *continuing in the possession* of the land, *and paying rent after* he made the feoffment, were the chief circumstances which induced the court to consider the feoffment to be fraudulent. The same may be observed of the case of *White* v. *Bacon*, Saville, 126. The continuing in the possession of the land after the conveyance has always been considered in our law as a badge of fraud. *Fermor's Case* therefore only proves, that if a tenant for years, after making a feoffment, continues in the possession of the land, and pays rent *tot v.*, the possession acquired by him under the feoffment is fraudulent; and therefore a fine, and every other act which derives its effect from that possession, is void. But *Fermor's Case* does not apply to the general question, of the operation of a fine levied by tenant for years, who has previously executed a feoffment, when the case is not affected by circumstances of fraud. The case mentioned before in the note of *Bailey* v. *Tanswell* is directly in point, that a fine so levied by lessee for years is a bar to the lessor after five years from the expiration of the lease. And with respect to the feoffor's remaining in the possession, if by the deed declaring the uses of the fine it is expressed that the fine should inure to his use, the possession will be invested in him by the Statute of Uses. — The editor begs to conclude with an observation of Lord Hardwicke (2 Atk. 631) which seems to him to sanction, in some measure, the general reasoning contained in this note: 'If it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice so as to make him a trustee for the person who had the right, because this would be carrying it much too far; for the defect upon the face of the deeds is often the occasion of the fine's being levied.' The doctrine contended for in this note seems to the editor to receive some countenance from the arguments and decision in *Goodright* v. *Forrester*, 8 East's Reports, 552." — *Butler's note to Co. Lit.* 330 *b*.

See *Smith* d. *Tiller* v. *Burton*, 6 Johns. 197.

to them to move to enter a nonsuit, if the court should be of opinion that the objections were well founded.

Murryatt now moved accordingly.

ABBOTT, C. J. I am of opinion that there is no foundation for either of the objections presented for our consideration. With respect to the first, I think, there is no ground for saying, that the adverse possession of Mr. Hull has operated as a disseisin of Whicher Souter. Mr. Hull did not take possession wrongfully, he only wrongfully continued possession. He came in under right and title, which remained good during the life estate of Henry Souter's widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance to Whicher Souter, who permitted him for a period to remain in possession. It has been held in a recent case in this court, that a mortgagor in actual possession of mortgaged premises is tenant by sufferance to the mortgagee, and this is a still stronger case than that. I know of no authority which says, that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment. Then, as to the second objection, I am decidedly of opinion, that no descent has been cast in this case. To allow the argument on this point would be to allow, that wherever a wrongful possessor dies in possession, and his heir enters, the real heir-at-law cannot support ejectment. That would be a monstrous proposition generally, but especially in this case, where the heir-at-law was never disseised, and the defendants in the action were never seised at all. The language of "descent cast" imports that the ancestor is seised; and the question is begged, if it is assumed that in this case Hull, the ancestor of the defendants, was seised.

BAYLEY, J. I am of the same opinion. In order to bar the power of devising a right of entry, there must be an actual disseisin of the devisor; a mere adverse possession will not suffice; he must be completely ousted of the freehold. The question, then, is, whether Whicher Souter, the devisor under whose will the lessors of the plaintiff claim, was ever divested of the freehold; and I am of opinion that he never was. The relation of Mr. Hull to Whicher Souter is that of landlord and tenant; the former was tenant by sufferance to the latter from the moment of Mrs. Souter's decease. This point was laid down in this court in the recent case cited by My Lord, and is founded upon the doctrine in Lord Coke. Co. Lit. 240 b. The lessors of the plaintiff have shown a clear title in Whicher Souter, and if he had an estate in the premises, he was competent to devise it; he does devise it, and it vests in the lessors of the plaintiff as devisees in trust under his will. To support a descent cast, it must be shown that the ancestor was seised. Here, there was no seisin of Mr. Hull, the ancestor. In a case which I remember came from Warwick some time since, the counsel relied upon a descent cast. It appeared in evidence that the party originally

came into possession rightfully, and his possession was lawful, until a particular person died. After the death of that person, the party held over, and levied a fine, and when he died an ejectment was brought against his heir. On behalf of the heir it was insisted, that there had been a descent cast. No, said the court; for upon the death of the particular person alluded to, the ancestor became tenant by sufferance only; and therefore there could not be a descent cast, because there was no seisin. The definition which Lord Coke gives of a tenant by sufferance, is he who originally comes in by right, but continues in possession by wrong. Now, that is exactly the description of Mr. Hull, under whom the defendants claim, and therefore I think the lessors of the plaintiff are entitled to recover. It is said, that there has been an adverse possession for twenty-two years in this case. I know of no case in which it has been held, that a mere adverse possession (if this case is so put), can operate as a disseisin, to prevent the owner of the freehold from devising it by will. Mr. Hull was only a disseisor in one way, namely, at the election of Whicher Souter. There are many authorities which say, that this would only be a disseisin at the election of the owner of the freehold of inheritance; and if Whicher Souter had thought fit to treat it as a disseisin, he would be warranted in doing so; but he was not bound to do so. *Doe d. Atkyns* v. *Horde*, Cowp. 689. On these grounds, I am of opinion that the lessors of the plaintiff are entitled to recover.

HOLROYD, J., and BEST, J., concurred. *Rule refused.*

DOE d. PARKER *v.* GREGORY.

KING'S BENCH. 1834.

[*Reported* 2 *A. & E.* 14.]

EJECTMENT for lands in Gloucestershire. On the trial before *Alderson*, B., at the last Gloucester Summer Assizes, the following facts were proved. Thomas Rogers, being seised in fee of the lands in question, devised them to his son Thomas Rogers for life, remainder to William Rogers in tail male, remainder to the devisor's right heirs in fee. The will gave a power to the tenant for life to settle a certain portion of the lands upon his wife for life, by way of jointure. After the death of the devisor, the son Thomas Rogers, being then tenant for life, settled the lands in question, being not more than the portion defined, upon his wife for life. He died in 1879, leaving his wife surviving, who afterwards married a person of the name of Vale. In 1810, Mr. and Mrs. Vale levied a fine of the lands to their own use in fee. In 1812, Mrs. Vale died, more than twenty years before the commencement of this action. Mr. and Mrs. Vale had continued in possession of the lands until Mrs. Vale's death, and Mr. Vale from thenceforward continued in

possession till his own death, which occurred in 1832. William Rogers died, leaving several children, all of whom died before Mrs. Vale: and of whom none left issue, except one daughter, who died one month before Mrs. Vale, leaving issue a son, who died without issue in 1814, within twenty years of the bringing of the action. The lessor of the plaintiff was heir at law to the devisor, Thomas Rogers. It did not appear how the defendant got into possession. On these facts, the learned judge nonsuited the plaintiff, on the ground that the right of entry was barred by the Statute of Limitations, but he reserved leave to move to set the nonsuit aside, and enter a verdict for the plaintiff.

Talfourd, Serjt., now moved accordingly.

Per Curiam (Lord Denman, C. J., Taunton, Patteson, and Williams, JJ.) The fine will make no difference; but, as to the question of the husband's adverse possession, we will take time to consider.

On a subsequent day Lord Denman, C. J., delivered the judgment of the court.

The other points moved by my Brother Talfourd were disposed of by the court, but we wished to consider whether he was entitled to a rule on the ground that there had been no adverse possession for twenty years. The fact was, that the defendant had been in possession for a longer period, from his wife's death, but he came in originally in her right, and had not directly ousted the rightful owner, but merely continued where he was, to his exclusion. A case of *Reading* v. *Rawsterne*, reported by Lord Raymond and Salkeld, 2 Ld. Raym. 830; s. c. 2 Salk. 423, was mentioned; but in that case, though an actual disseisin is declared necessary, those words must be taken with reference to the subject-matter, and are there contra-distinguished from the mere perception of rents and profits, in the case of joint-tenants. But in *Doe. dem. Burrell* v. *Perkins*, 3 M. & S. 271, the court was of opinion that a fine levied by a person who was in possession under the same circumstances as the defendant here, operated nothing, because he came in by title, and had no freehold by disseisin; and it was argued, that the defendant here was also to be considered as having entered rightfully, and committed no disseisin. We are, however, of opinion, that though this may be so for the purpose of avoiding a fine, it cannot prevent the defendant's possession from being wrongful, from the very hour when his interest expired by his wife's death. It is clear that he might have been immediately turned out by ejectment. We think, therefore, that his continuing the same possession for twenty years entitles him to the protection of the Statute of Limitations, and that this action has been brought too late.

Rule refused.[1]

[1] See 2 Sm. L. C. (9th ed.) 733–736.

DOE d. GRAVES *v.* WELLS.

King's Bench. 1839.

[*Reported* 10 *A. & E.* 427.]

Ejectment [against Wells and Trowbridge] for lands in Wiltshire. The several demises were alleged in the declaration to have been made on 17th October, 1836, *habendum* for seven years, from 15th October, 1836. After pleas pleaded, Wells compromised with the lessors of the plaintiff, but Trowbridge continued to defend. On the trial before *Patteson*, J., at the Wiltshire Summer Assizes, 1837, it was proved, on the part of the plaintiff, that Graves, the lessor of the plaintiff, was entitled to the reversion upon a lease under which Trowbridge held, which lease was for ninety-nine years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved that, on 17th October, 1836, Graves's agent, in a conversation with Trowbridge, who was then in possession, demanded the rent of him, but Trowbridge then refused to pay it, and asserted that the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer, working a forfeiture of Trowbridge's term; the defendant's counsel disputed this, and contended further that, even supposing this to be a forfeiture, the demise was laid too early, being on the very day of the supposed forfeiture. The learned judge directed the jury to find for the plaintiff, if they were of opinion that the words used by Trowbridge were not mere idle language, but a serious claim of the fee. The jury having found for the plaintiff, the learned judge reserved leave to the defendant's counsel to move to enter a verdict for the defendant. In Michaelmas Term, 1837, *Crowder* obtained a rule accordingly.

Erle and *Barstow*, now showed cause.

Crowder and *Butt*, contra.

Lord Denman, C. J. I think *Doe dem. Ellerbrock* v. *Flynn*, 1 Cr. M. & R. 137; s. c. 4 Tyrwh. 619, is distinguishable from the present case. There it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went farther than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the nature of the tenancy has been sometimes lost sight of, and the words "forfeiture" and "disclaimer" have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited. But no case, I think, goes so far as the present; and I

feel the danger of allowing an interest in law to be put an end to by mere words.

LITTLEDALE, J. We should not, indeed, be justified in putting an end to a state of law on account of its danger; for we must give parties whatever the law entitles them to: but here the law leads to no such consequence. The case is not like that of a tenancy from year to year, which lasts only as long as the parties please, and where what has been called a disclaimer is evidence of the cessation of the will. Here property is claimed on the ground of forfeiture. Now, assume the jury to have been right in their verdict: still the facts do not go far enough for a forfeiture. In Comyns's Digest, tit. Forfeiture, and in Viner's Abridgment, tit. Estate (see 10 Vin. Abr. 370, sqq. Forfeiture (C. b), &c.), a very great number of instances of forfeiture are given: but there is no allusion to any case of this kind; the instances are either of matters of record, or of acts *in pais* quite different from what is here insisted upon. In an *Anonymous Case* in Godbolt, 105. pl. 124, the tenant claimed the fee on the record, in an action of debt: and yet it was held to be no forfeiture. *Doe dem. Ellerbrock* v. *Flynn* has been satisfactorily distinguished by My Lord.

PATTESON, J. No case has been cited where a lease for a definite term has been forfeited by mere words. We know that mere words cannot work a disseisin, although some acts have been held to work a disseisin at the election of the party disseised, which, as against him, would not work a disseisin. An attornment again is an act. Here there is no act; and, if we held that there was a forfeiture, we should be going much beyond any previous decision. It is sometimes said that a tenancy from year to year is forfeited by disclaimer: but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy.

WILLIAMS, J., concurred. *Rule absolute.*[1]

[1] So, *accord*. *De Lancey* v. *Ganong*, 9 N. Y. 9 (1853).

"Till within a comparatively recent period, it was considered that a tenant could not, in any sense, repudiate his tenancy, even where it existed by parol merely, or from year to year; or that he could not do this without surrendering or abandoning the premises. But it is now settled otherwise in this State, and in the United States Supreme Court. The tenant, by distinct notice to his landlord that he will no longer hold the premises under him, has been regarded here as committing an absolute disseisin, and after that, as holding adverse to the landlord, and unless evicted before the term of the Statute of Limitations expires, he will, by such adverse possession, acquire title in his own right. In *Willison* v. *Watkins*, 3 Peters U. S. 48, Mr. Justice Baldwin says: 'Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will, from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them.' This case was professedly followed in two cases in this State: *Greene* v. *Munson*, 9 Vt. 37; *Hall* v. *Dewey*, 10 Vt. 593; and has been recognized in many others. It is undoubtedly a new doctrine, and adopted here from a regard to the difference in our land tenures,

BOARD *v.* BOARD.

QUEEN'S BENCH. 1873.

[*Reported L. R.* 9 *Q. B.* 48.]

EJECTMENT to recover possession of a dwelling-house and premises situate in the parish of Burnham, in the County of Somerset.

The defendant defended for the whole.

At the trial before *Grove*, J., at the Somersetshire Spring Assizes, 1873, a verdict was found, by consent, for the plaintiff, subject to a special case, the court to be at liberty to draw from the facts all the inferences which a jury might have drawn.

In the year 1820 one Robert Amesbury was seised and possessed as tenant by the curtesy of (*inter alia*) the premises mentioned in the writ of ejectment hereinafter called the disputed premises.

Robert Amesbury was twice married. By his first wife, Hannah, who died intestate about the year 1812, and who was seised and possessed of an estate of freehold of inheritance in the disputed premises, he had issue four daughters, Rebecca, Fanny, Lydia, and Maria, and one son, Joseph. His second wife, Mary Locke, was a sister of his first wife, Hannah.

On the 15th of April, 1800, Fanny Amesbury married one William Board, and by him had issue three sons, William Board, the plaintiff Robert, and Joseph. Fanny Amesbury, afterwards Fanny Board, died, and William Board, in 1818, married her sister Rebecca. The defendant, Thomas Board, is the son of William Board and Rebecca.

Robert Amesbury died in the year 1820, having previously duly made and executed his will (whereof John Amesbury was sole executor), dated the 24th of May, 1819, and a codicil to the will dated the 23d of August, 1820. By his will Robert Amesbury (hereinafter called the testator) devised (amongst other things) to William Adams and John Buncombe, as trustees, the disputed premises in trust for his daughter Rebecca for her life and the life of William Board, to live in, provided they, or one of them, should pay unto the testator's three grandsons, William, Robert the plaintiff, and Joseph, the annual sum of £3 each, and after the decease of Rebecca the testator devised (*inter alia*) the disputed premises to his grandson William charged with two annuities of £7 each payable to Robert the plaintiff and Joseph for their lives. The three annuities of £3 each were duly paid until 1826 to William, Robert the plaintiff, and Joseph Board, respectively, by Rebecca Board, respectively, under the circumstances hereinafter appearing.

The testator also devised to his only son Joseph certain other premises situate in the parish of Huntspill, charged with an annuity of £10 pay-

and in our civil and social relations and institutions in many respects, from those in England." — *Per* REDFIELD, C. J., in *Sherman* v. *Champlain Transp. Co.*, 31 Vt. 162, 177 (1858). See 2 Tayl. Landl. and Ten., § 522.

able to the testator's second wife for life, and after her decease to her children (excepting Ann Board) for their lives, as joint tenants.

By the codicil the testator charged the premises situate at Huntspill, with a further sum of £5 per annum to be paid during her natural life to Rebecca, the second wife of William Board, and he declared that if his son Joseph Amesbury, his heirs, executors, administrators, or assigns, should call in question or dispute the validity of his marriage with Mary Locke, or the marriage of William Board with his daughter Rebecca, then the devises and bequests given to his son Joseph Amesbury should be revoked and be null and void; and he gave and devised the same with their appurtenances unto either of them whose marriage might be called in question, their heirs and assigns forever.

The will and codicil were proved on the 4th of November, 1820, by Joseph Amesbury. Joseph Amesbury accepted the benefit of the devises to him contained in the will, and never disputed or called into question before his death, nor have his heirs or executors ever disputed, the validity of the marriages or either of them.

At the death of the testator, Rebecca and William Board were residing with him upon the disputed premises, and upon the death of the testator, Rebecca and William Board continued to remain in the actual enjoyment and occupation of the same.

In the year 1826 the plaintiff purchased of his brother Joseph Board, Joseph Board's annuity of £3, and from the date of the death of testator down to the year 1834, the plaintiff received the sum of the two annuities from Rebecca Board. In or about the same year 1826 William Board, brother of the plaintiff, sold his annuity of £3 to Joseph Amesbury, who was in the habit of regularly each year deducting that amount from the annuity payable by him to Rebecca Board under the provisions of the will and codicil.

In 1837 William Board, the reputed husband of Rebecca Board, died, leaving Rebecca in occupation of the disputed premises.

In 1842 the annuities payable to the plaintiff and his brother William were in arrear. The plaintiff pressed for payment of the arrears, and eventually an agreement was entered into on the 3d of November, 1842, between Rebecca Board and the plaintiff that in consideration of Rebecca giving up into the possession of the plaintiff during the term of her natural life two pieces of arable land, the plaintiff acquitted and discharged Rebecca for all arrears of annuity and all annuities that might hereafter become due and owing to him.

The plaintiff, in pursuance of the agreement, took possession of the two pieces of land in satisfaction of the annuities, and still remains in possession of the same.

In 1849 the plaintiff bought of his brother William Board all William's remainder in the two pieces of land last mentioned, and in the disputed premises.

In April, 1863, Rebecca Board sold the disputed premises by auction to her son Thomas Board, the defendant. The plaintiff, with his legal

adviser, attended the sale, and the latter publicly stated on behalf of the plaintiff, that Rebecca Board had no right to sell the disputed premises; but the defendant nevertheless persisted in purchasing the premises, and the same, in pursuance of the sale, were duly conveyed by Rebecca Board to the defendant.

For many years prior to the sale, and down to May, 1872, Rebecca Board and her son, the defendant, resided together on the disputed premises, the land being farmed and managed by the defendant.

In May, 1872, Rebecca died, and the defendant continued in possession of the disputed premises. On the 13th of June, 1872, the plaintiff as and being the assignee of the interest and remainder of his brother William Board, demanded possession. Possession was refused, and this action was thereupon commenced.

The question for the opinion of the court is, whether the plaintiff is entitled to the disputed premises, or to any and what part of them.

Arthur Charles, for the plaintiff.

T. W. Saunders, for the defendant.

BLACKBURN, J. In this case I think the plaintiff is entitled to our judgment. The facts are that Robert Amesbury was tenant by the curtesy, and consequently when he died he had nothing to devise. Joseph Amesbury was the heir-at-law, and, but for the Statute of Limitations, would be entitled to the estate. Robert Amesbury, however, made a will, leaving the property to Rebecca for life, with remainder to William in fee. Rebecca entered into possession, and enjoyed the property under the will, paying the legacies and annuities, and in every way clearly showing that she continued in possession because she was a devisee under the will. She lets the defendant into possession, who claims under her, but he, being privy in estate to her, is subject to all the estoppels that would have estopped her. Then the question is, whether Rebecca, having taken under the will which gave her an estate for life, is not estopped from saying that as against William or the person claiming under him, the will, under which she came in as tenant for life, and William was remainderman, is void; she cannot be allowed to assert that, although she was let in and enjoyed under the will, nevertheless it was void; and that the heir-at-law, Joseph, is entitled to the land, and as twenty years have run against his title he is barred, and she, having acquired the fee by twenty years' undisturbed possession, can prevent William from taking under the will. Rebecca claimed under the will, and retained possession under the will, and she, as against everybody interested in the will, is estopped from denying its validity.

The case is like that of a tenant coming in under a landlord: he is estopped from denying his landlord's title. As to the point that Robert, being only a tenant by the curtesy, had nothing to devise, it may be said that in many instances the landlord has only an equitable title, and yet the tenant is estopped from disputing such title. I think if the law were otherwise the consequences would be disastrous, for how unjust it would be if a person who comes in under a will as tenant for life, and

continues in possession until twenty years have elapsed, could say there was a latent defect in the title of his predecessor, and the estate devised really belonged to the heir-at-law, and his title being barred, he, the tenant for life, is entitled to the property in fee simple. It is contrary to the law of estoppel that he who has obtained possession under and in furtherance of the title of a devisor should say that such title is defective. My Brother Martin, in *Austen* v. *Nelms*, 1 H. & N. 232; 26 L. J. (Ex.) 8, says that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful, so as to give to his heir a right against a remainderman. That seems directly in point. It is good sense and good law. All we have to decide here is that Rebecca, having entered under the will, William, the remainderman under the same will, has a right to say that she and all those claiming through her are estopped from denying that the will was valid.

MELLOR, J. I am of the same opinion. The only person who could dispute the possession of Rebecca under the will was the heir-at-law. He never disputed the possession, and his title to the estate is barred by the operation of the Statute of Limitations. Whatever his motive was, whether he received advantages under the will or not, or whether he chose to abstain from making any claim or not, is wholly immaterial, because the effect of the Statute is absolutely to bar him at the end of twenty years. That being so, Rebecca enters into possession under the will, taking a life estate, and during the continuance of that estate effects a sale adversely to the interests of the remainderman under the will. Now, Rebecca having accepted the estate under the will, and having acted under the will, treating the will as a perfectly valid will, cannot defeat the title of the remainderman under the will by alleging that the devisor had no title. It would be contrary to the wholesome doctrine of estoppel to allow a person who takes a limited interest under a will, after she has been in possession for twenty years under the will, to convert her limited interest into a fee. A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will. Here the contest is between two persons, one claiming through the tenant for life, the other through the remainderman. I think the title of the remainderman must prevail, and the plaintiff is therefore entitled to our judgment.

QUAIN, J. I am of the same opinion. I decide this case on the simple point that a person who takes under a will, and acts on the will in paying the legacies and annuities given under it, cannot afterwards turn round and place himself in a different position, and maintain that he is in a position adversely to those who take under the same will. Rebecca having entered into possession as a tenant for life, was estopped as against all those who are in remainder to her under the will, from saying, in fact, that her father, Robert Amesbury, had not the right to make the will. *Judgment for the plaintiff.*

WELLS *v.* PRINCE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1813.

[*Reported* 9 *Mass.* 508.]

THIS was a petition for partition of certain lands in Boston, on which a verdict was taken for the petitioner at the last March Term in this county, subject to the opinion of the court upon the following point, viz

Francis Wells, being seised of the lands in question, devised all his real estate to his wife Susannah for her life, remainder to the petitioner and others, and died in 1766. The said Susannah never entered on the lands, of which partition is prayed, and she died in the year 1793. The petitioner entered in 1808. The question reserved was, whether his right of entry, if any he had, was not barred.

Jackson, for the respondent.

Amory, for the petitioner.

BY THE COURT. The defence in this case is, that the devisee for life having never entered, her refusal to accept the devise is to be presumed: and then the right of entry of the petitioner or remainderman having accrued immediately, he was bound to enter within twenty years; and having failed so to enter, his right of entry is gone, without which he cannot maintain this process.

That those in remainder might have entered immediately on the refusal of the devisee for life to accept the devise, is true. But one may have different rights of entry: and although the devisee for life refuses to accept the estate devised, and the remainderman thereby acquires an immediate right of entry, yet he is not obliged to avail himself of his right so accruing; but he may enter after his second right accrues by the death of the tenant for life. The petitioner then had not lost his right of entry on the death of Susannah Wells, and he is entitled to partition of the premises. Let the interlocutory judgment be entered, *quod partitio fiat*.

FRENCH *v.* PEARCE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1831.

[*Reported* 8 *Conn.* 439.]

THIS was an action of trespass *quare clausum fregit*; tried at Litchfield, February Term, 1831, before *Williams*, J.

The plaintiff and defendant were adjoining proprietors of land; and the land in controversy was the border between them, which was woodland, unfenced. Both parties claimed under William French, the

father of the plaintiff and of the defendant's wife. The plaintiff's title was admitted, unless the land was conveyed to the defendant's wife, by a deed dated the 11th of May, 1809; in which the line on the side adjoining the plaintiff was particularly described. A part of the description was "from a butternut-tree a straight line to Platt's corner — said piece being the same land which the grantor bought of Rev. Mr. Benedict." The defendant contended, that as the deed to his wife referred to the land purchased of Mr. Benedict, he might show where were the bounds of that lot; and claimed, that by those bounds, there was not a straight line from the butternut-tree to Platt's corner. This was accompanied with evidence, by which he claimed to have shown, that he had occupied and possessed the land in question for more than fifteen years, although not included in the straight line mentioned in the deed. The plaintiff denied the occupation of the defendant; and denied also any difference in bounds in consequence of the reference to Mr. Benedict's deed, and any adverse possession by the defendant.

The judge charged the jury, that in considering where were the boundaries of this lot of the defendant's wife, if the description in the deed was doubtful, they might take into consideration the possession or occupation of the defendant, for the purpose of determining those bounds. But if they should find, that the defendant had possessed the land in question for more than fifteen years, claiming and intending only to occupy to the true line, as described in his deed and no further, then his possession must be referred to his deed, and it would not be adverse to the plaintiff; and the jury, notwithstanding such possession, must look to the deed, to determine the line of division.

The jury returned a verdict for the plaintiff; and the defendant moved for a new trial for a misdirection.

J. W. Huntington and *J. Strong*, in support of the motion.

Bacon, contra.

Hosmer, C. J. Whether the line of occupancy was the dividing line between the parties, was the point of controversy between them. The jury were charged, so far as relates to the deed, that if the line described in it was doubtful, they might take into consideration the possession and occupation of the defendant, for the purpose of determining it. This opinion seems not to be questioned; nor is it questionable. An occupation of land, by the defendant as his own, under the plaintiff's eye, to what he supposed to be the dividing line between him and the plaintiff, and which, for many years, the plaintiff permitted without a question, from the mutual assent of the parties, is strong presumptive evidence of the true place of the line. 1 Phill. Ev. 420–22.

On the point of title by fifteen years' possession, as the only objection made at the trial, was, that the possession of the defendant was not adverse, it must be assumed, that none other existed. Of consequence, the controversy is confined to that single point.

By "adverse possession" is meant a possession hostile to the title of another, or, in other words, a disseisin of the premises; and by "dis-

seisin" is understood an unwarrantable entry, putting the true owner out of his seisin. Co. Lit. 153 b, 181.

The inquiry, then, is precisely this: What must be the character of the act, which constitutes an adverse possession?

This question was directly answered, in *Bryan* v. *Atwater*, 5 Day, 181, and by this court. A clear and unquestionable rule was intended to be given. The court commenced the expression of their opinion, by saying: "It will be necessary to ascertain *precisely* the meaning of the terms *adverse holding* or *adverse possession*." The first principle asserted in that case is, that to render a possession *adverse*, it is not necessary that it should be accompanied with a claim of title and with the denial of the opposing title. The case next affirms that possession is never adverse, if it be under the legal proprietor and derived from him. After these preliminaries, it is inquired: "But more particularly, what, in point of law, is an adverse possession? It is," say the court, "a possession, *not under the legal proprietor, but entered into without his consent, either directly or indirectly given*. It is a possession, by which he is disseised and ousted of the lands so possessed." That there should remain no doubt, they next inquire, What constitutes a disseisin? After showing negatively that it is not requisite to enter claiming title, or denying the title of the legal owner, they remark affirmatively, that it is only necessary for a person to enter and take possession of land *as his own*; to take the rents and profits to himself; and to manage with the property as an owner manages with his own property: that is, the person thus possessing must act as if he were the true owner and accountable to no person for the land or its avails. A criterion is then given to determine whether a possession is adverse. "It is only necessary to find out," say the court, "whether it can be considered *as the constructive possession of the legal proprietor*."

I have been thus particular in analyzing this case, in which the reasons were drawn up by a very able and eminent jurist; as it presents, in the plainest language, a sure and most intelligible landmark, to ascertain when a possession is adverse. It is peculiarly observable, that by the reasons given, anxiously labored as they were, it was intended to put the question at rest for the future. The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the *motive* of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason: that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.

It is not necessary that I should proceed further, as the point of decision, in the case before us, has been settled, by this court, and with great precision. At the same time, it may be the more satisfactory to

show, that the determination here is in harmony with the decisions of other courts.

In Westminster Hall, the character of an adverse possession is well established. The possession of a person denying the title of the owner, or claiming the premises, or taking the whole rents and profits without accounting, is held sufficient evidence of actual ouster. *Doe d. Fisher et al.* v. *Prosser*, Cowp. 217; *Doe d. Hellings et Ux.* v. *Bird*, 11 East, 49; *Stocker* v. *Berny*, 1 Ld. Raym. 741; s. c. by the name of *Stokes* v. *Berry*, 2 Salk. 421. The extent of the doctrine is defined by the following considerations. The possession of a tenant in common is held not to be adverse, without actual disseisin or its equivalent, as he is presumed to possess for his fellow commoner; but the possession of an individual entering not under another, is adverse, by a perception of the profits only to his own use.

In the State of New York the entering on land under *pretence* of title, or under a claim *hostile* to the title of the true owner, constitutes an adverse possession. *Brandt d. Walton* v. *Ogden*, 1 Johns. Rep. 156; *Jackson d. Griswold* v. *Bard*, 5 Johns. Rep. 230; *Jackson d. Bonnel et al.* v. *Sharp*, 9 Johns. Rep. 162.

To the same effect is the law of Massachusetts. "To constitute an actual ouster," said Parsons, C. J., "of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession." *Kennebeck Purchase* v. *Springer*, 4 Mass. Rep. 416, 418; *Boston Mill Corporation* v. *Bulfinch*, 6 Mass. Rep. 229. It is obvious, that a person who takes possession, does not the less claim to hold it against him who before was seised, because he conscientiously believes, that he has right to possess.

The law of Maine, so far as it is expressed in the case of *Kennebeck Purchase* v. *Laboree et al.*, 2 Greenl. 275, is in perfect harmony with that of the States already mentioned. "The doctrine on this subject," said Mellen, C. J., "seems to be plain and well settled. A possession must be adverse to the true owner, in order to constitute a disseisin. The possessor must claim to hold and improve the land *for his own use*, and exclusive of others." He next states, that in a count on the demandant's seisin, it was never incumbent on the tenant to prove more than his continued possession and occupancy for thirty years next before the commencement of the action, *using and improving the premises after of the manner of the owner of the fee*; and he then subjoins, that such possession, unless explained, affords satisfactory evidence to the jury, that such tenant claimed to hold the land as his own.

In the case of *Brown* v. *Gay*, 3 Greenl. 126, the question was, whether the tenant was in possession of certain land by disseisin. He owned a lot denominated No. 3, and was in possession of lot No. 4, claiming that it was part of the former lot. He was, therefore, in possession through mistake. This principle was advanced, by the court,

to wit: "If the owner of a parcel of land, through inadvertency or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate a disseisin, so as to prevent the true owner from conveying or passing the same by deed."

If the learned court meant to lay down the position, that although the possession was adverse and a disseisin, yet that it was of such a character as not to prevent the owner from transferring the land by deed, the case has no bearing on the one before us. But if it was intended to declare, that there was no disseisin at all, by reason of the before-mentioned mistake, I cannot accede to the proposition. There was a possession; it was not under the true owner, but it was under a claim of right; and the rents and profits (if any) were received and appropriated to the possessor's use, without any supposed or assumed accountability. This is a disseisin, by all the cases on the subject, with every mark or *indicium* of one upon its face. If the possession were incidental to the taking of something off the property, it would be a trespass only. But when the possession is a permanent object, under a claim of right, however mistaken, what can be a disseisin, if this is not? That the possessor meant no wrong, might be very important, if he were prosecuted for a crime: for *nemo fit reus, nisi mens sit rea.* But the motive, which induced the taking possession, is remotely distant from the possession in fact under a claim of right, and in no respect tends to qualify or give character to the act. It was adverse possession and disseisin (innocently happening) with the full intention of the mind to possess exclusively: and by necessary consequence, a seclusion of the owner from the seisin of his property.

I agree with the learned court, that the intention of the possessor to claim adversely, is an essential ingredient. But the person who enters on land believing and claiming it to be his own, does thus enter and possess. The very nature of the act is an assertion of his own title, and the denial of the title of all others. It matters not, that the possessor was mistaken, and had he been better informed, would not have entered on the land. This bears on another subject, — the moral nature of the action: but it does not point to the inquiry of adverse possession. Of what consequence is it to the person disseised, that the disseisor is an honest man? His property is held, by another, under a claim of right: and he is subjected to the same privation, as if the entry were made with full knowledge of its being unjustifiable.

In the case of *Ross* v. *Gould*, 5 Greenl. 204, it is said, "A disseisin cannot be committed by mistake, because the intention of the possessor to claim adversely, is an essential ingredient in disseisin." I do not admit the principle. It is as certain that a disseisin may be committed by mistake, as that a man may by mistake take possession of land, claiming title and believing it to be his own. The possession is not the less adverse, because the person possessed intentionally, though innocently. But in the moral nature of the act, there is undoubtedly a difference, when the possessor knowingly enters by wrong.

I have been the more particular in my observations, for two reasons. The first is, that the evidence of adverse possession, which is of very frequent occurrence, might be placed on grounds clear and stable; the next, from a serious apprehension that in the law of disseisin an important change is inadvertently attempted. Adopt the rule, that an entry and possession under a claim of right, if through mistake, does not constitute an adverse possession, and a new principle is substituted. The inquiry no longer is, whether visible possession, with the intent to possess, under a claim of right, and to use and enjoy as one's own, is a disseisin; but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explored; and the inquiry is to be had whether the possessor of land acted in conformity with his best knowledge and belief.

In the case before us, the plaintiff adduced evidence to show, that he entered on the land in question, and possessed it more than fifteen years, uninterruptedly and exclusively, under a claim and belief of right, and appropriating to his own use, without account, all the rents and profits. This was adverse possession and disseisin, and gave him title under the law of the State.

Upon this principle, the charge was incorrect, and a new trial is advised.

The other judges were of the same opinion, except PETERS, J., who was absent. *New trial to be granted.*[1]

SUMNER *v.* STEVENS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1843.

[*Reported* 6 *Met.* 337.]

WRIT OF ENTRY. The demandant claimed title to the demanded premises under a deed of warranty from Stephen Stevens, her father, who was also father of the tenant. At the trial, before *Wilde*, J., the tenant rested his defence upon a title by disseisin of said Stephen, and offered evidence tending to show, that more than 20 years before the date of the demandant's writ, and before said Stephen's deed to the demandant, said Stephen made a gift to him, by parol, of the demanded premises, and that he afterwards went into possession thereof, and continued in exclusive possession upwards of 20 years.

Upon this evidence, the jury were instructed, that if they believed it, and also believed that the tenant entered and continued his possession, *claiming title*, this would constitute a title by disseisin, and that they should return a verdict for the tenant. The jury found a verdict for the tenant, which is to be set aside, if the foregoing instruction was incorrect.

[1] *See Smith* v. *McKay*, 30 Ohio St. 409; *Seymour* v. *Carli*, 31 Minn. 81.

Sumner and *Byington*, for the demandant.

Porter, for the tenant.

SHAW, C. J. The case shows that the tenant entered, more than twenty years before the commencement of this action, under a parol gift from his father, and has had the sole and exclusive possession ever since. Had the tenant simply shown an adverse and exclusive possession twenty years, he would have shown that the owner had no right of entry, and that would have been a good defence to this action. Is it less so, that the tenant entered under color of title? A grant, sale or gift of land by parol is void by the Statute. But when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner, and not as tenant; and it equally proves an admission on the part of the donor, that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the Statute, but which the parties, by mistake, believe good. The possession of such grantee or donee cannot, in strictness, be said to be held in subordination to the title of the legal owner; but the possession is taken by the donee, as owner, and because he claims to be owner; and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession; but until he does this, by entry or action, the possession is adverse. Such adverse possession, continued twenty years, takes away the owner's right of entry. *Barker* v. *Salmon*, 2 Met. 32; *Parker* v. *Proprietors of Locks and Canals*, 3 Met. 91; *Brown* v. *King*, 5 Met. 173; *Clapp* v. *Bromagham*, 9 Cow. 530. We have not used the term "disseised," because the accurate definition and description of disseisin has been the subject of much discussion. The term is somewhat equivocal, and the same facts may prove a disseisin, for some purposes and in some aspects, and not in others. It is enough for the decision of this case, that the tenant had the actual, exclusive and adverse possession of the estate more than twenty years, by which the owner, and all persons claiming under him, were barred of their entry and right of action. Rev. Sts. c. 119, § 1.

Judgment on the verdict.[1]

GRUBE *v.* WELLS.

SUPREME COURT OF IOWA. 1871.

[*Reported* 34 *Iowa*, 148.]

APPEAL from Des Moines District Court.

Action to recover the possession of a part of lot 260, in the northern addition to the city of Burlington, being a strip of about the width of

[1] But see *Clarke* v. *McClure*, 10 Grat. 305.

fifteen feet, of the south end of said lot. Trial to the court without a jury, and judgment for plaintiff. Defendant appeals.

Halls and *Baldwin*, for the appellant.

No appearance for the appellee.

BECK, C. J. The District Court found the following facts, and thereon rendered judgment for plaintiff: The plaintiff is the owner of lot 260, in the northern addition to the city of Burlington, and the defendant owns lot 1, in Wood's subdivision, which adjoins plaintiff's lot on the south. About twenty-five years ago defendant's grantor enclosed lot 1, and made other improvements upon it. The fence on the north was set about fifteen feet over the line upon lot 260, which was unenclosed, and remained in that condition until within the last four or five years. Defendant and her grantor have had actual possession and exercised rights of ownership over the strip of land in controversy since it was enclosed, but have never had any other right or color of title than such as result from the possession stated. They have held the land under the belief that it was covered by the deeds conveying to them lot 1, and were not informed otherwise until within about one year, when, upon an accurate survey, the true line was established. There is no dispute about the other boundaries of lot 1, and defendant's title and possession to the whole of it have never been questioned. Defendant has paid taxes continuously on lot 1, and plaintiff on lot 260.

The question presented by the foregoing facts, as found by the District Court for determination, is this: Is defendant protected in her possession of the land in dispute by the Statute of Limitation?

I. The Statute of Limitation is not available as a defence, unless the defendant holds the land under color of title, or has had actual adverse possession for the full time limited by the Statute for the commencement of the action. *Wright* v. *Keithler*, 7 Iowa, 92; *Jones* v. *Hockman*, 12 Id. 101; s. c. 16 Id. 487. It is not claimed that in the case before us defendant holds color of title to the land, but recovery is resisted on the ground that she and her grantor have been in the adverse possession of the property for the time which, under the Statute, will bar the action. We are required to determine whether the possession relied upon is of that character which is deemed by the law adverse.

An essential ingredient of adverse possession is a *claim of right* hostile to the true owner. So, if one enter upon the land of another, without any color of title, or claim of right, the possession thus acquired is not adverse, but the possessor will be deemed by the law to hold under the legal owner. In such a case no length of possession will make it adverse. *Jones* v. *Hockman*, supra; *Bradstreet* v. *Huntington*, 5 Pet. 402 (440); *Ricard* v. *Williams*, 7 Wheat. 59; *Conegys* v. *Cooley*, 3 Watts, 280; *Gray* v. *McCreary*, 4 Yates, 494; *Brandt ex dem. Walton* v. *Ogden*, 1 Johns. 156; *Jackson ex dem. Bonnell et al.* v. *Sharp*, 9 Id. 163.

II. The *quo animo* in which the possession was taken and held is a test of its adverse character. The inquiry, therefore, as to the inten-

tion of the possessor, is essential in order to determine the nature of his possession, and, before his possession may be pronounced adverse, it must be found that he intended to hold in hostility to the true owner. *McNamee* v. *Moreland*, 26 Iowa, 97. See also *Bradstreet* v. *Huntington*, supra, and the other authorities last cited.

III. The facts relied upon to constitute adverse possession must be strictly proved; they cannot be presumed. The law presumes that the possession of land is always under the regular title, and will not permit this presumption to be overcome by another presumption. There can be no such thing as conflicting legal presumptions. *McNamee* v. *Moreland*, supra; *Ellis* v. *Doe*, 1 Blackf. 129.

IV. The defendant's grantor, when he entered upon the land in dispute, did not claim title thereto. He claimed title to lot 1, but to no part of lot 260. It is very plain that, under the authorities above cited, the claim of right must be as broad as the possession. Defendant's claim was limited to lot 1 — his possession covered that lot, and a part of lot 260; he took possession of more land than he claimed. But, is the fact, that the *belief* of defendant and her grantor, that lot 1 extended to the line of their possession, equivalent in law to a *claim* of title to the land in dispute? The term *belief* implies an assent of the mind to the alleged fact, and is not supported by knowledge. One may believe a proposition without making it known, or without possessing any knowledge upon the subject. It is, or may be, a passive condition of the mind, prompting in neither action nor declaration. The term *claim* implies an active assertion of right, — the demand for its recognition. This assertion and demand need not be made in words; the party may speak by his acts in their support, as by the payment of taxes, erection of improvements, etc. One may *believe* that he has a right to land without asserting or demanding it. But it is said the right is asserted by the possession. This cannot be admitted, for the possession, to be supported by the law, must be under claim of right. The argument is this: The lawful possession is proved by the claim of right, which, in turn, is established by the possession. The reasoning is within a very narrow circle. But there is another objection to it upon a principle above stated. The adverse character of the possession must be strictly proved, and, in the argument just noticed, it is inferred from an alleged condition of mind.

As we have seen, the *intention*, the *quo animo* of the possessor, must be shown. This cannot be done by mere proof of possession: it must be shown to exist under certain conditions, to be qualified by the existence of a claim of right; for the adjective characteristics of a thing cannot be shown by proof of the mere existence of the thing itself.

In this case we have the possession admitted. As we have seen, it must be shown to be adverse under a claim of right. Simple belief on the part of defendant of her right to the land, we have pointed out, is not equivalent to, nor will it supply the place of, the claim required by

the law, and, as we have shown, possession will not establish the *quo animo*. There is, then, in the case, absolutely no evidence of the adverse holding of defendant.

The conclusion we have announced is supported by decisions of this court, and by other authority. *McNamee* v. *Moreland*, 26 Iowa, 97; *Brown* v. *Cockerell*, 33 Ala. 45; *Hamilton* v. *Wright*, 30 Iowa, 480; *Burnell, Adm'r of Russell*, v. *Maloney*, 39 Vt. 579; *St. Louis University* v. *McCune*, 28 Mo. 481; *Riley* v. *Griffin et al.*, 16 Ga. 141; *Brown* v. *Gay*, 3 Greenl. 126; *Ross* v. *Gould*, 5 Id. 204; *Lincoln* v. *Edgecomb*, 31 Me. 345; *Gilchrist* v. *McLaughlin*, 7 Ired. 310.

V. The following cases are cited by defendant's counsel, in support of views contrary to the doctrines we have just announced. We will briefly notice them.

Burdick v. *Heidy*, 23 Iowa, 511, is not in conflict with the foregoing views. In that case, there was a claim of right distinctly shown, if not an agreement of the parties to the effect, that the disputed line was in fact the true boundary of the lands. In *Close* v. *Samm*, 27 Iowa, 503, the right in question related to the flowing back of water upon the mill of plaintiff, by a dam built by the other party. That right was sustained upon evidence of prescription, and it was claimed to the extent exercised by defendant. Here was an express claim of right. In illustration of the ruling made by the court, Mr. Justice Cole supposes the case of conflicting claims to land adjacent to a boundary line. But the case he puts expressly supposes the party availing himself of the Statute of Limitation to *claim* the lands, and to set up an adverse possession under color of title. In *Brown* v. *Bridges*, 31 Iowa, 138, the right of plaintiff to recover is based upon prescription, and it clearly appears that he had *claimed* and held possession of the land in dispute, and upon that ground set up his prescriptive title. In *Stuyvesant* v. *Tomkins*, 9 Johns. 61, the point decided is, that trespass, *quare clausum fregit*, will not lie on behalf of one not in possession of lands. Whatever appears in that case, relating to the point under consideration, was said *arguendo*. In *Lawrence* v. *Hunt*, 9 Watts, 64, the claim under the Statute was based upon an actual survey, and in *Brown* v. *McKenney*, Id. 565, it is held that the party setting up adverse possession is protected therein, as it is expressly said by the court, under a *claim* of title to the land.

In these authorities, there is to be found nothing in conflict with the conclusions we have reached in this case.

In our opinion, the ruling of the District Court upon the facts found is correct. *Affirmed.*[1]

[1] The doctrine of this case, which has prevailed to a considerable extent in the United States, seems to have had its origin in *Brown* v. *Gay*, 3 Greenl. 126 (1824), and *Gilchrist* v. *McLaughlin*, 7 Ired. 310 (1847). These decisions were followed in Alabama by *Brown* v. *Cockerell*, 33 Ala. 38 (1858); and in Missouri by *St. Louis* v. *McCune*, 28 Mo. 481 (1859); but although these cases have never been in terms overruled in their respective States, subsequent decisions in Maine, Alabama, and

BOWEN *v.* GUILD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1881.

[*Reported* 130 *Mass.* 121.]

TORT for breaking and entering the plaintiff's close in Attleborough, and erecting a fence thereon. At the trial in the Superior Court, before *Devens*, J., the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions, which, so far as material to the point decided, appear in the opinion.

W. H. Fox, for the defendant.

G. Marston, for the plaintiffs.

LORD, J. We have deemed it necessary in this case to consider but one of the various questions raised by the defendant. Mr. Ellis Ames, a counsellor of this court, testified "that in August, about the year 1870, he went upon the land with Mr. Bowen, one of the plaintiffs; that they went all over the land and saw no fence, either upon the road or any other side of the land; that the land was rough and uncultivated; that bushes were growing upon a part of it; that he saw no indication that the land had been cultivated that year; that he saw no one else on the land; and that they went upon the land for the purpose of discovering, if they could, any evidence of adverse occupation upon which he could bring a writ of entry against Charles L. Guild." The presiding judge ruled that, if the facts thus testified to were true, they constituted, as matter of law, necessarily, an interruption of an adverse possession of the defendant, commencing at the time of the institution of the former suit, in August, 1857, and continuing, with such exception, to the commencement of the present action, in October, 1878, a period of more than twenty years.

This ruling seems to have been based upon a misapprehension of the decision in *Brickett* v. *Spofford*, 14 Gray, 514. In that case, it appeared that the owner of the land went upon it in company with one who proposed to purchase it, for the purpose of ascertaining, in view of the proposed purchase and sale, the value of the land, the quantity and quality of the wood upon it, and such elements as were necessary to determine its value; and that after such entry the owner of the land gave a deed of it to the person who was at the time of their going upon the land negotiating for its purchase. The court did not hold, as matter of law, that such entry upon the land was conclusive upon the

Missouri seem to have but little life in them. *Abbott* v. *Abbott*, 51 Me. 575, 584 (1864); *Hutchinson* v. *Morrison*, 74 Me. 331 (1882); *Decker* v. *Hibbard*, 73 Me. 165. *Alexander* v. *Waddell*, 69 Ala. 342 (1881). *Wallerman* v. *Bullen*, 68 Mo. (1878); *Cole* v. *Jordan*, 70 Mo. 372 (1879). And see *Cleary* v. *Gardenier*, 22 N. Y. 170. But the doctrine of *Cooke* v. *Wells* was applied in an extreme case in *Ware* v. *Abeles*, 35 Kans. 85 (1886).

question of adverse possession by the defendant; but held that it was evidence to be submitted to the jury, with all the other evidence in the case, in determining whether the party did make such a re-entry as to enable him to convey his estate by deed; the only question in that case being whether the plaintiff's grantor was so dissei sed at the time of the conveyance as that he could not effectually convey his title except by re-entry and delivery of the deed upon the land. The defendant had been in possession only two years, and his title was obtained through a levy upon the estate which had been previously made, and which was unrecorded, and therefore void as against the plaintiff, taking a deed under the judgment debtor's title without notice. If, in that case, the entry as thus made had not been followed by the assertion of title which the conveyance by warranty deed implies, and had been followed by no other act of possession during the subsequent eighteen years during which the defendant had continued to hold it, and the court had decided that the adverse possession could not commence until after such possession, because such an entry was an interruption to the adverse possession, that decision would have been authority for the ruling. But the question there presented was an entirely different one. It had no relation to the question of the acquisition of title by adverse possession, but only to the question whether the true owner was so dissei sed at the time of his grant that his deed passed no title; and in that case the decision of the court went only to the point that the evidence was proper to be submitted to the jury upon the question whether he had in fact so repossessed himself, under an entry claiming the highest right of ownership, that of selling the land, and actually selling it, after negotiations upon it, as to make his deed effectual.

The entry in this case was followed by no act of ownership, and was simply a passing over the land for the purpose of ascertaining its condition, to see whether any use had been made of it, or whether any buildings or structures had been erected upon it, and to see whether there was any evidence of a dissei sin. It did not appear that such passing over the land was in presence of the defendant, or that he ever in any mode had any knowledge of it. The circumstances under which it was made, and the time of day or night, do not appear, except as it may be inferred from the known character of the gentleman under whose direction it appears to have been done. It is consistent with the actual use by the defendant of the land upon every other day of the twenty years. It was a question for the jury whether in fact it was an interruption of the defendant's possession. That fact must be determined by them upon all the evidence in the case; and it was error in the presiding judge to rule, as matter of law, that it was necessarily such a re-entry and reclamation of possession as to be an interruption in fact of the defendant's possession.

What is an adverse and exclusive possession, and what is an interruption of such possession, depend very much upon the character of the land, and the purposes to which it is adapted and for which it is used.

The adverse possession of an outlying lot of small value, remote from the dwellings of people, suitable for pasturing or for the growth of wood, or for some other purpose of husbandry, is to be proved by evidence very different from that which establishes the exclusive occupation of a residence or a shop or storehouse within the limits of a thickly settled business population. The rule of law is the same in both cases; but the evidence necessary to prove the fact is very different. In either case the question is, Has the adverse possession, considering the nature, situation, and uses of the land, been exclusive and continuous? The presiding judge having ruled that this single fact, though proper to be considered, was in itself, as matter of law, an interruption of the possession, it was error.

Although there may be cases in which the occupation by the true owner may be of such a nature, and so continued, that it would be the duty of the court, upon the truth of such facts being apparent, to rule, as matter of law, that the adverse possession had been interrupted, still the general principle is that it is a question for the jury to determine whether in fact the adverse possession has been continuous or has been interrupted. *Stevens* v. *Tuft*, 11 Gray, 33, 35; *O'Hara* v. *Richardson*, 46 Penn. St. 385. See also *Peaceable* v. *Read*, 1 East, 568; *Jackson* v. *Wood*, 12 Johns. 242; *Van Gordon* v. *Jackson*, 5 Johns. 440, 467; *Mayor of Hull* v. *Horner*, Cowp. 102; *Fisher* v. *Prosser*, Cowp. 217; *Jackson* v. *Joy*, 9 Johns. 102; *Beverly* v. *Burke*, 9 Ga. 440; *De Haven* v. *Landell*, 31 Penn. St. 120; *Croft* v. *Weakland*, 34 Penn. St. 304.

Exceptions sustained.

NOTE. — As to what acts of occupation constitute a disseisin, see *Jackson d. Hendricks* v. *Schoonmaker*, 2 Johns. 230; *Slater* v. *Jepherson*, 6 Cush. 129. Cf. *Hazelton* v. *Wheeler*, 29 Conn. 391.

D. *Constructive Possession.*

JACKSON d. GILLILAND *v.* WOODRUFF.

SUPREME COURT OF NEW YORK. 1823.

[*Reported* 1 *Cowen*, 276.]

EJECTMENT for land in Plattsburgh. The defendant relied on the Statute of Limitations.[1]

S. A. Foot, for the plaintiff.

Z. R. Shipherd, contra.

WOODWORTH, J. In September, 1794, Z. Platt executed a quitclaim deed to Nathaniel Platt for 783 acres of land, purporting to convey,

[1] The statement of facts is omitted, and only that portion of the opinion which deals with the question of constructive possession is given.

thereby, lands lying between the east and south lines of allotted lands in Plattsburgh, and the line of Friswell's Patent. On examining the boundaries, and the map annexed to the case, it will be found not to include any land; for there is no gore between the two patents. The description follows: "Beginning at the distance of 7 chains, 8 links, north from the southeast corner of lot No. 99, in the second division of Plattsburgh; thence east, 27 chains and 50 links, to John Friswell's Patent." Now, as it has been shown that Friswell's Patent joins on Plattsburgh, the line cannot be extended easterly. If it was so extended, it would run on lands included in that patent, which is not admissible under the words of the deed. The next course is to the northwest corner of the patent, which must be understood the true northwest corner of Friswell, as proved by the plaintiffs; thence east, in the east bounds of Friswell's Patent, until the north line, to the lotted land in Plattsburgh, will include 783 acres, between that line and lot No. 101, in the second division of Plattsburgh. By tracing these lines on the map, it will be seen that a line only is given. No land is included: consequently the deed is a nullity, inasmuch as nothing is granted. The question, then, is whether a claim of title under such an instrument, and an actual occupancy of part, can constitute a good adverse possession beyond the parcel so occupied.

It is well settled that a continued possession for twenty years, under pretence or claim of right, ripens into a right of possession which will toll an entry. It has never been considered necessary, to constitute an adverse possession, that there should be a rightful title. *Jackson* v. *Wheat*, 18 John. 44; *Smith* v. *Lorrilard*, 10 John. 356; *Smith* v. *Burtis*, 9 John. 180; 13 John. 120; 2 Caines, 83. The party who relies on an adverse possession must, in the language of Kent, C. J., in *Jackson* v. *Shoemaker*, 2 John. 234, show "a substantial enclosure, an actual occupancy, a *pedis possessio*, which is definite, positive, and notorious, when that is the only defence to countervail a legal title:" and in *Doe* v. *Campbell*, 10 John. 477, it is said, "adverse possession must be marked by definite boundaries, and be regularly continued down, to render it availing." 1 John. 156. There is no doubt that actual occupancy and a claim of title, whether such claim be by deed or otherwise, constitute a valid adverse possession to that extent. But when a party claims to hold adversely a lot of land, by proving actual occupancy of a part only, his claim must be under a deed or paper title. This distinction has been uniformly recognized and acted upon in this court. It is on this latter ground the defendants must rest, if their possession can avail. Their defence is that Z. Platt, in 1794, conveyed 783 acres to N. Platt, including the premises; that the first improvement was made in 1794 under Platt, being a small parcel, not exceeding two acres, which, together with the premises in question, afterwards taken under him, have been continued to the time of commencing this action. This proof does not make out an adverse possession to the premises. Color of title under a deed,

and occupancy of part, is sufficient proof as to a single lot: yet it follows from the doctrine laid down that the deed, or paper title, under which the claim is made, must in the description include the premises. If the title is bad, it is of no moment; but if no lands are described, nothing can pass. The deed is a nullity, and never can lay the foundation of a good adverse possession beyond the actual improvement. There is no evidence here to show how far Platt's claim extended, unless resort is had to the deed. Boundaries, therefore, including the premises, were indispensable in order to give this defence the semblance of plausibility. The defendants stand on the same ground as if no deed had been produced: and then the possession cannot extend beyond the place actually occupied.

In *Jackson ex dem. Dervient* v. *Lloyd*, decided October Term, 1820, but not reported, it appeared that the defendant had a deed for lot No. 4, but took possession of Lot No. 5, adjoining, believing it to be his lot, and claiming it as such. It was held that the defendant could not establish an adverse possession to the whole lot, by the actual improvement of a part, because no part of No. 5 was included in the deed.

But if the deed had been perfect in the description, and included 783 acres of Friswell's Patent, the occupancy of a part would not make out an adverse possession to the whole quantity conveyed. The doctrine of adverse possession, applied to a farm or single lot of land, is in itself reasonable and just. In the first place, the quantity of land is small. Possessions thus taken, under a claim of title, are generally for the purpose of cultivation and permanent improvement. It is generally necessary to reserve a part for woodland. Good husbandry forbids the actual improvement of the whole. The possessions are usually in the neighborhood of others; the boundaries are marked and defined. Frequent acts of ownership, in parts not cultivated, give notoriety to the possession. Under such circumstances, there is but little danger that a possession of twenty years will be matured against the right owner: if it occasionally happens, it will arise from a want of vigilance and care in him who has title. It is believed that no well-founded complaint can be urged against the operation of the principle; but the attempt to apply the same rule to cases where a large tract is conveyed would be mischievous indeed. Suppose a patent granted to A. for 2000 acres; B., without title, conveys 1000 of the tract to C., who enters under the deed, claiming title, and improves one acre only; this inconsiderable improvement may not be known to the proprietor, or if known, is disregarded for twenty years. Could it be gravely urged that here was a good adverse possession to the one thousand acres? If it could, I perceive no reason why the deed from B. to C. might not include the whole patent, and after the lapse of twenty years equally divest the patentee's title to the whole; for there would exist an actual possession of one acre, with a claim of title to all the land comprised in the patent. No such doctrine was ever intended to be

sanctioned by the court. It may therefore be safely affirmed that a small possession, taken under the deed to N. Platt, cannot under any circumstances be a valid possession of the whole 783 acres, but is limited to the parcel improved. If the doctrine contended for prevails, it would sanction this manifest absurdity that a possession under Platt's deed, which conveyed no title, would, as to its legal effect, be more beneficial than a possession taken under the proprietors of Friswell's Patent, where there is not only title, but a good constructive possession, in consequence of the grant, and actual occupancy and improvement of a part. It cannot be useful to pursue the subject farther.

I am of opinion that the plaintiff is entitled to judgment for an undivided fourth part of the premises.[1]

SAVAGE, C. J., concurred in a judgment for the plaintiff for one undivided fourth part of the premises, and the court gave

Judgment accordingly.[2]

JACKSON d. HASBROUCK *v.* VERMILYEA.

SUPREME COURT OF NEW YORK. 1827.

[*Reported* 6 *Cowen*, 677.]

EJECTMENT for twenty-five acres of land, including a grist-mill in Middletown, Delaware County; tried at the circuit in that county, September 1st, 1823, before *Nelson*, C. J.; when a verdict was taken for the plaintiff, subject to the opinion of this court, on a case.

Ruggles and *Hasbrouck*, for the plaintiff.

Sherwood and *Parker*, contra.

The facts are stated in the opinion of the court, which was delivered by

WOODWORTH, J. The plaintiff claimed title as the assignee of a mortgage, executed by Noah Ellis to Phillip Sickler, dated Oct. 5, 1811.

The premises described, contained twenty-five acres; and included part of a grist-mill in possession of the defendant. It appeared that Ellis was in possession of the premises at the date of the mortgage, by virtue of a lease from Gen. Armstrong to him, and continued in possession for several years thereafter, when he surrendered to the mortgagee.

The defendant disclaimed having possession of any part of the twenty-five acres, excepting the mill and mill site. He read in evidence a lease from Armstrong to Andrew Sickler, dated Oct. 10, 1818, for the mill and mill site, and twenty-five acres of land, being the premises in question; which lease was assigned to the defendant. A lease from Armstrong to Ellis, dated May 1, 1802, was given in evi-

[1] The opinion of SUTHERLAND, J., is omitted.

[2] See *Chandler* v. *Spear*, 22 Vt. 388.

dence by the plaintiff. It was admitted to have lately come from the hands of Armstrong. The signatures were erased, and the seals torn off. A corner of the lease with part of the description of the premises was also torn off.

By the case, the lease was to be produced on the argument; it has not been delivered to me. I am, therefore, unable to say, whether it contained any reservation of part of the premises. This fact is then to be ascertained by the testimony of Ellis, which was not objected to. He says the lease was in his possession, when the mortgage was given; that the corner was torn off accidentally; that the seals remained on as long as he held it. The description of the premises included a part of the mill. Ellis also testified, that he did not know that the defendant had ever been in the actual occupation of any part of the premises, excepting the mill and pond. He could not say from recollection, but he believed the lease contained an exception of mill sites, from the circumstance of his obtaining permission from Armstrong to build the mill; and from knowing that mill sites were excepted in all his leases. The witness never claimed the mill site under his lease. On this state of facts, I think we are to consider, that, in the lease to Ellis, the mill site was excepted. I presume by inspection of the lease, it cannot be determined whether excepted or not. This, however, is not expressly stated. I apprehend that neither party would be disposed to rest on parol testimony, as to the contents, unless the lease had been defaced, or a part of it destroyed.

On this statement, the plaintiff made out a title to recover the twenty-five acres, excepting so much as was comprehended within the mill site reserved; provided the defendant was in possession of the land not included in the mill site. He admitted he had possession of a part, (the mill and mill site,) not exceeding two acres. The plaintiff offered no testimony as to the extent of the defendant's actual occupancy; but contends that, as Armstrong conveyed to the person under whom the defendant derives title, the whole twenty-five acres, the defendant is to be considered as the possessor to that extent.

It appears that the premises are woodland. There are no improvements. The right of Ellis passed to the plaintiff by virtue of the mortgage. The land has never been actually occupied: but it will be recollected that the lease to Ellis contained sixty-three acres, of which the twenty five acres mortgaged, were parcel; that Ellis actually occupied a part of the sixty-three acres, and claimed title to the whole; so that, although the twenty-five acres were unimproved, he had a good adverse possession to the whole, on the ground of occupancy of a part, and a lease including the sixty-three acres. The conveyance obtained from Armstrong in 1818, although it includes the twenty five acres, conferred no title to anything but the mill site; neither can it operate so as to transfer to the defendant a constructive possession of the twenty five acres, in consequence of his having possession of the small parcel comprising the mill site.

I think the defendant must be considered as claiming title to the twenty-five acres; having accepted an assignment of the lease which comprised them.

Color of title under a deed, and occupancy of a part, is sufficient proof to constitute an adverse possession to a single lot. (1 Cowen, 286.) This principle applies only to cases where there is no actual occupancy under a different claim. Thus, if A. takes a lease or conveyance for a lot of sixty-three acres, and improves a part, his possession is valid for the whole lot; not on the ground of having title, which draws the possession after it, until an actual adverse possession commences; but on the ground of a claim of title to the whole, and a possession of part, which constitutes a good adverse possession. When a valid possession is acquired in the latter mode, it cannot be defeated by a subsequent entry on the same lot, making an improvement of a part, and obtaining title to the whole. The effect of such subsequent entry would be, to give the person so entering, a possession of the part actually occupied and improved; but no farther. A constructive possession to the unimproved part of the lot, would remain in him who made the first entry under claim of title, and improved a part. Apply this principle to the present case. The possession under Ellis, of the twenty-five acres, was not impaired by the assignment of the lease of 1818 to the defendant, and occupation of the mill by him. It appears that Ellis never claimed the mill site. The consequence is, that the defendant was not in possession of the twenty-five acres, except that part thereof which constituted the mill site; and for that portion the plaintiff is not entitled to recover.

Neither can he recover that part which is covered by a part of the mill and the pond, supposed to contain not more than two acres; because Armstrong, having reserved mill sites in his lease to Ellis, afterwards granted the same by a conveyance under which the defendant claims. And although there is no specific description of the quantity of land reserved, it must be intended to include so much as might reasonably be required for the purpose of erecting and carrying on the business of a mill. The defendant has located and entered upon a small parcel for that purpose; which the facts in the case do not enable me to say was unreasonable or too extensive. It is contended that the reservation was merely an easement or privilege; but this is evidently a mistake. A mill site is reserved, which is a reservation of so much land as may be necessary for the purpose of erecting and working a mill. The plaintiff has not shown how much land the defendant actually occupies as a mill site. The defendant admits the quantity of two acres. Under his grant, he must be considered as having located this parcel, as appurtenant and necessary to the mill. There is nothing in the case to show that this was too extensive. It is not material, whether the location was made before or after the execution of the mortgage; for if the mill site was reserved, no right to it was acquired by the mortgage; and the defendant

might actually enter on, and locate the premises, as well after as before.

I am, therefore, of opinion that, as to the mill site on which the mill was erected, the defendant has shown title; and as to the twenty-five acres of woodland, the defendant was not, in judgment of law, the possessor. Consequently the defendant is entitled to judgment.

Judgment for the defendant.[1]

SIMPSON *v.* DOWNING.

SUPREME COURT OF NEW YORK. 1840.

[*Reported* 23 *Wend.* 316.]

THIS was an action of *ejectment*, tried at the Schoharie Circuit, in October, 1838, before the *Hon. John P. Cushman*, one of the circuit judges.

The plaintiffs claimed to recover seventy-four acres of land, part of three hundred and eight acres in a tract called Banyar's patent, granted in 1770, and deduced a regular title to the three hundred and eight acres, from the original patentees, by sundry mesne conveyances, to themselves. The defendants, on their part, gave in evidence: 1. A *mortgage* from one Jacob Horn to John Thurman, bearing date 2d March, 1800, of a tract of land containing two hundred and five acres, three roods, and sixteen perches, described as part of lot number seven, in a tract granted to John Morin Scott *and others;* 2. A deed from Horn to Nehemiah Finch, dated 11th June, 1806, of the same premises; 3. Proof of the death of Finch; letters of administration upon his estate granted to Philip Cornell, on the 1st April, 1813, and a surrogate's order made 10th June, 1816, authorizing the sale of the premises described in the deed from Horn to Finch, but requiring that one Titus Reynolds should unite in the sale and conveyance of the premises; 4. A deed under the surrogate's order, from Cornell, the administrator, to John Collins, bearing date 18th March, 1819, duly executed by Collins; *but Reynolds, the person named by the surrogate, did not unite in its execution;* 5. A deed dated 24th August, 1819, from Collins to Elizabeth Gilchrist; 6. A deed from Robert Gilchrist, the son and heir-at-law of Elizabeth Gilchrist, to Downing, one of the defendants in this cause, dated 15th January, 1823, and then a conveyance of a portion of the premises from Downing to the other defendants. The seventy-four acres claimed by the plaintiffs, are part of the Banyar patent, but are included in the boundaries of the premises conveyed by the deeds produced on the part of the defendants. Horn took possession of his farm in 1792; in 1800 he had it surveyed, taking in the seventy-four acres, and *claiming as his own* the whole two hundred

[1] See *Eagle* v. *Emery*, 11 Vt. 521.

and five acres, as *part of lot number seven, of Scott's patent*. Finch, after the conveyance to him, and probably within four years thereafter, cut timber upon the seventy-four acres, for the erection of a barn, and he and those claiming under him from time to time cut timber upon the seventy-four acres for fuel and fencing. In 1823 Downing, previous to his purchase, had a survey made of the two hundred and five acres, including the seventy-four acres, which at that time was woodland, uncleared and unenclosed. No acts of ownership on the part of the plaintiffs as to the seventy-four acres were shown, except that in 1801 the plaintiffs employed an agent to prevent *trespasses* on the three hundred and eight acres owned by them, including of course the seventy-four acres, who in one or two instances called trespassers to account. A small part of the *undisputed* portion of the plaintiffs' land was cleared and cultivated as early as 1800. The bill of exceptions, after setting forth the evidence, proceeded thus: "And the said judge so holding the said circuit court, did then and there deliver his *opinion* to the jury, and *charge* them" that the plaintiffs had made out a good paper title to the premises in question; that the defendants had failed to make out a good *paper title*, under which they had possessed the premises in question for twenty-five years, inasmuch as Reynolds, the person designated by the surrogate, had not united with the administrator in the execution of the deed to Collins, and consequently that such deed did not convey any title. That to constitute an *adverse possession*, it was incumbent upon the defendants to show twenty-five years' possession; that the possession *prior* to 1819, the date of the deed to Collins, did not make out the necessary time; and the possession *since* that period was unavailable, because the deed from the administrator did not divest the *legal title* of the *heirs* of Finch, and consequently there was not a *continuance* of the adverse possession: "and with that direction and under the said charge, left the cause with the jury," as expressed in the bill of exceptions. The bill then proceeds: "Whereupon the counsel for the defendants did then and there *except* to the aforesaid *opinion* and *charge* of the said judge, and insisted that the said deed of the said Cornell, administrator as aforesaid, although defective, was sufficient to constitute an adverse possession in the defendants; and that from the testimony, the defendants were entitled to a verdict, for the reason aforesaid. Whereupon the said jury then and there, under the said charge of the circuit judge, gave their verdict for the said plaintiffs," &c.

By the Court. (Cowen, J.) Only two legal points were made by the judge in the charge: one, that the plaintiffs had established a good paper title; the other, that the defendants had failed to continue their line of deeds. The bill excepts to the aforesaid *opinion* and *charge*, leaving it somewhat equivocal *which opinion*, or whether *the whole charge*. But the bill immediately adding in connection with the exception, "and insisted that the said deed of the said Cornell was sufficient," &c., specifically indicates the ground of exception. It is saying,

in other words, (though I admit somewhat inaptly,) that the counsel excepted because the deed was sufficient to make out the privity. The great purpose in requiring the point and object of exception to be mentioned is, that notice may be given to the court and opposite party. In this case, for instance, admitting the deed to be valid, it was not yet too late for the court to allow, in its discretion, evidence that the defendants had acknowledged the plaintiffs' title, or any other fact overcoming the defence of adverse possession. They were, I think, in this respect put upon their guard by the words connected with, and explaining the extent of the exception. This view is not incompatible with the rule laid down in *Willard* v. *Warren*, 17 Wendell, 258–9. Besides, the exception was not only to the "aforesaid opinion," but also to the *charge*. It being plain that two points of law only were stated in the charge, it would not be a strained construction to say the exception to the charge reached both those points. The same thing was done in *Hardon* v. *Hamilton*, 6 Cowen, 189. Of this there is certainly some doubt, where the charge is not so far, as inserted in the bill, exclusively confined to points of law; and so where the points of law are numerous. Indeed it may not be a safe rule to say that where there is more than one, the exception need not distinguish which it is intended to reach. The substance of the exception should always be settled and clearly understood, and noted down at the trial. The matter to which it applies should also be well understood there. It is, therefore, the better way, if not, in general, essential, to mention the particular point in the charge.

There can be no doubt of the rule insisted on by the counsel for the plaintiffs, that could we suppose each of the parties to have, from the beginning, stood in such a relation to the premises as, without title, would constitute in them respectively a constructive adverse possession, the one who superadded the legal title should prevail. It would be like the case of an actual possession in both, claiming adversely. Other things being equal, the legal right turns the scale. Adams on Eject. 54, ed. by Tillinghast, and note 3d there. See also *Bryant* v. *Allen*, 2 Hayw. Rep. 74. It is plain, however, that a constructive adverse possession, arising from circumstances, precisely coeval and concurrent, must be a rare case. One, in general, closes the door against the other, at least by priority of time.

Accordingly, such a community of possession as might neutralize the defendant's claim, not being entirely clear in the principal case, the learned judge at the circuit put it on a defect in the deed under the surrogate's order. The plaintiffs, therefore, cannot now say they are entitled to recover, if that deed was valid for the purpose of keeping up the continuity of possession on which the defence rested. No doubt that, as the Statute regulating probate conveyances stood when the deed was concocted and executed, it was void on its face. That was admitted at the circuit, and not denied at the bar. It is equally clear that where an adverse possession in several persons successively is

necessary to complete the term of limitation, they must show an unbroken transmission of the possession from one to the other, during a sufficient number of years to satisfy the Statute of Limitations. In this case the limitation beginning to run before the Revised Statutes were passed, the time was twenty-five years. *McCormick* v. *Barnum*, 10 Wendell, 104.

Had the claim here been of an actual adverse possession continued from Horn down to the defendants, perhaps there would have been less difficulty. Everything then would be manual and tangible. The *pedis possessio* would be seen devolving from one to another; and a vicious, even a void deed, intervening, might not take from the effect. But this is by no means clear. The rule, as laid down in the books, is that there must be an adverse possession by the defendant or by those *under whom he holds*, or both, for the term of limitation. Adams on Eject., ed. by Tillinghast, 47. Can one be said to hold an adverse possession under another, in any case, without privity either of contract, blood or estate? Be that matter as it may, however, it seems to me that many arguments combine to show that privity is necessary to the continuity of *constructive possession*, when we regard the notion of that kind of possession as it prevails under the law of this State. Of such a possession, I understand a *deed*, or some *instrument* sufficient in form for the purpose of carrying title, to constitute an essential ingredient. It is made up of an actual possession of part, claiming the whole under a deed which covers the whole. In such case and not short of that, is the grantee said to be in constructive possession of the part unoccupied. Finch began with such a possession by his deed from Horn in 1806. That possession continued in him to 1813 at farthest, when he died; and after an interval of five or six years, a conveyance is executed by Cornell, his administrator, to Collins, void on its face for every purpose of passing any interest. Collins may then be taken as beginning a constructive adverse possession *de novo*. But this leaves the defence short of twenty-five years. It wants the connecting link between Finch and Collins, — a possessory link, I admit; but that appears to me to depend on a valid deed, without which I do not see how another deed, one essential element, is to be transferred. Collins took no actual possession. There has been none in any of his successors. Either as an actual possessor or in some other way he must come into Finch's shoes; but all the interest of the latter was suffered to descend to his heirs. Suppose Finch had conveyed in his lifetime and Collins had come in under a deed from a total stranger, driving off and dispossessing Finch's grantee; Cornell was but a stranger, and Collins took adversely to Finch's heirs. The line of continuation lay through them. Both Finch's possession and that of his heirs was, I admit, a wrong. The Statute of Limitations, however, had begun to run. They had a right to say that this wrong should be continued and made available in their successors. But it was not such a wrong as would work a right in any hands without Finch's deed, or his title under it. Every

adverse possession is a wrong amounting to an inchoate right. In the latter sense, it is transferable by sale or gift; but when *constructive*, there is no corporal seisin which can be transferred by livery. It is in the nature of an incorporeal right. True, there must be a corporal, not to say a contiguous, possession of part; but that is amplified and spread over the actually vacant premises lying adjacent, by a deed in the tenant's bureau. The right is thus extended in theory or contemplation of the law; and when the essential elements no longer co-exist, the complex idea vanishes, or dwindles to the actual, corporal, territorial limit. The English law has never, I believe, admitted the refinement which creates a constructive possession by mere claim, though under color of a wrongful deed. It seems to prevail, however, under divers limitations in several different States. At any rate, it has long been recognized as existing in this State: *Jackson, ex dem. Putnam*, v. *Bowen*, 1 Caines, 358; *Jackson, ex dem. Bristol*, v. *Elston*, 12 Johns. R. 452, 454; though its practical application seems not to have been well understood till *Jackson, ex dem. Gilliland*, v. *Woodruff*, 1 Cowen, 276; *Jackson, ex dem. Ten Eyck*, v. *Richards*, 6 Id. 617, 623; and *Jackson, ex dem. Hasbrouck*, v. *Vermilyea*, Id. 677. *Vid.* also *Jackson, ex dem. Gee*, v. *Oltz*, 8 Wend. 440, 1.

The rule was found so well adapted to the exigencies of new and unsettled parts of the State that it was afterwards expressly adopted and its operation limited according to our adjudications, by the Revised Statutes, 2 vol. 222, 2d ed. Under either the common law or Statute rule, the ideal possession cannot be extended, by a written instrument, beyond the customary size of the lot or farm partly occupied. The size must accord with the usage of the adjoining country; and section 9th declares that there must be a *continued occupation* for twenty years under *such claim; i. e., under the written instrument*, &c., which works the extension. The abstraction once being formed must take a course in the regions of technical jurisprudence to be regulated by analogies, drawn from other branches of the law, — mainly, I admit, from the doctrine of actual possession, to which it is regarded as an equivalent. Thus, co-existing or mixed with another like possession, it is, as we have seen, neutralized. But the prior abstraction fills the described territory, and prevents the interference of one subsequently arising in the hands of a third person, though an actual possession by the latter will overcome the abstraction. *Jackson, ex dem. Hasbrouck*, v. *Vermilyea*, before cited. What then is continuity of estate, as understood in analogous branches of the law? How is the claim of the successor to be identified, in the language of the Revised Statutes, (for I take these to be but a repetition of the principle as it stood before,) with the prior wrongful adverse claim under the same instrument? The answer seems obviously, by such conveyances from one to another as, supposing a good title to exist, would transfer that title. It is essential, to effect such a purpose, that the original deed at least, whatever title there was under it, should pass along the line by conveyance. Clearly such a

probate deed as we have here would not work the effect. The death would leave the deed itself to descend, as a part of the inheritance. So in many cases the right to the deed passes from one to another in virtue of the grant of the whole estate holden under it. *Buckhurst's Case*, 1 Rep. 1. It is the same thing where we are inquiring for the continuance of a wrongful deed or title. As between the parties who stand along the line of succession, the title is looked upon as rightful. The deed to be carried may contain a warranty, and thus be material to the grantee as an indemnity. The deed to Finch might thus have passed along the whole line from Horn to the defendants. Coming to Finch, however, his death and the void deed from his administrator to Collins, broke the concatenation. Being void, it was as no deed; and we concur with the circuit judge that the defence by adverse possession can date only from the administrator's deed. The time being thus short of the limitation, the verdict was therefore right; and a new trial should be denied.

By the CHIEF JUSTICE. This case might have been placed at the circuit on the ground that the plaintiffs had shown a legal title in fee to the premises in question, and an actual possession of part claiming title to the whole, long before the commencement of the constructive adverse possession of the defendants now set up; and which possession and claim continued down to the commencement of the suit.

But I think it may also be maintained on the ground taken by Mr. Justice Cowen. — Cornell, the administrator, not having been joined in the deed by the discreet freeholder, is to be regarded as a stranger to the premises: his deed therefore did not convey even a right to the possession of Finch, the intestate: that went with the claim of title to his heirs. The continuity of Finch's possession was thereby broken: the defendants not connecting themselves with it.

Whatever, therefore, may have been the character of the adverse possession shown by the defendants, it fell short of the requisite time to bar the plaintiffs.

New trial denied.

BAILEY *v.* CARLETON.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1841.

[*Reported* 12 *N. H.* 9.]

WRIT OF ENTRY, to recover two tracts of land in the lower village in Bath, one of said tracts being ten rods in length, and the other being four square rods of land, situated immediately south of and adjoining the first tract; both constituting a narrow strip of land, situated betwixt the main road through Bath village, and the Amonoosuck River.

The tract of land first described, and a house lot opposite to the same, on the other side of the road, were conveyed to Amos Town by Moses P. Payson, by two several deeds, executed on the 27th of March, 1807; and the tract containing four square rods was conveyed by said

Parson, in November, 1807, to Buxton & Blake, who sold to one Morrison, and, in 1810, Morrison sold to said Town.

In February, 1813, Amos Town sold the three tracts of land to his brother, Solomon Town, and in April, 1815, Solomon Town re-conveyed the house lot opposite the demanded premises, to Amos Town, but did not include, in the description, the strip of land opposite, and now in controversy.

October 19, 1815, Amos Town conveyed the aforesaid three several tracts, giving separate descriptions of each tract, to Ebenezer Carleton, and subsequently Carleton's title was conveyed to these defendants.

Solomon Town, in June, 1830, conveyed the demanded premises to one John Welsh. Welsh, in February, 1837, conveyed to the plaintiff, and this suit was brought for the recovery of the demanded premises, the 15th of April, 1837.

It appeared that Ebenezer Carleton, on his purchase of Amos Town in October, 1815, entered into possession of the house lot named in his deed, and lived on and occupied the same for many years, until it was conveyed to the defendant, E. Carleton, Jr.

In 1821, Ebenezer Carleton caused a small building to be removed on to the land in controversy, and from that time to the present it has remained there, occupied by tenants under him and these defendants.

The defendants claimed to hold the land by virtue of peaceable and undisturbed possession, by themselves and their grantor, for a period of twenty years. It appeared that until 1821 no building had been placed upon the premises, and that the premises had not been enclosed in any manner; that from 1815 to 1821, and since, Ebenezer Carleton had been in the habit, occasionally, of leaving carts, ploughs, and farming utensils upon this land, and also of leaving lumber upon it. Evidence was offered to show that it had been a common practice, by teamsters and owners of lumber, for thirty or forty years, to lay lumber upon that side of the road, in Bath village, upon this tract, and above and below it, and that said Carleton and other individuals had been in the habit of laying lumber along the river bank in this manner.

It was contended, by the defendants' counsel, that Ebenezer Carleton having entered upon the house lot, claiming title to and occupying the same, such entry extended to the contiguous tracts described in the same deed, and that entry and occupation of one of the tracts extended to the whole, in the same manner as though they had been conveyed in one description; that the defendants' grantor having entered upon and disseised the plaintiff's grantor, October 19, 1815, and the plaintiff never having re-entered before action brought, he had no legal seisin in the demanded premises within twenty years next before the commencement of his action, and his suit, therefore, could not be maintained, and that the laying of lumber on the demanded premises, by persons claiming no right thereto, would not affect the exclusive character of the defendants' adverse possession.

The court instructed the jury that an entry upon, and occupation of

one of the tracts conveyed, would not extend to the other tracts described in the deed, so as to give a title to them by possession: that entry upon, and occupation of, any portion of the demanded premises would extend to the whole tract entered upon; that it was not essential that any portion of the land should be enclosed, in order to constitute an adverse possession; that such possession might be acquired by the laying of lumber upon said tract, or otherwise occupying it as a place of deposit for farming utensils, &c., but that such possession must be an open, visible possession, such as would give reasonable notice of such adverse possession, to the owner.

A verdict was rendered for the plaintiff, and the defendants moved to set the same aside, for misdirection.

J. L. Carleton and *Bell*, for the defendants.

Goodall, (with whom was *Bartlett*,) for the plaintiff.

PARKER, C. J.[1] The general rule that where a party having color of title enters into the land conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed, seems to be settled by the current of authorities, 3 N. H. Rep. 27, *Riley* v. *Jameson;* Ditto, 49, *Land* v. *Parker*, and cases cited.

And such entry may operate as a disseisin of the whole tract: and the possession under it, continued for the term of twenty years, may be deemed an adverse possession, which will bar the entry of the owner after that lapse of time. 3 N. H. Rep. 49; 13 Johns. R. 118, *Jackson* v. *Ellis;* Ditto, 106, *Jackson* v. *Smith;* 18 Johns. 355, *Jackson* v. *Norton.*

Exceptions have been suggested to the rule in some cases. One is, where a large tract of land is embraced in the deed, and a small part only has been improved. 1 Cowen, 276, *Jackson* v. *Woodruff;* 6 Cowen, 677, *Jackson* v. *Vermilyea.* Another, where the deed under which the claim is made includes a tract greater than is necessary for the purpose of cultivation, or ordinary occupancy. 8 Wend. R. 440, *Jackson* v. *Oltz.*

These exceptions seem not to be very definite in their application, for lots, like other things, are large or small by comparison, and a tract which would be much too large for cultivation by one, would not suffice for another. But they serve to show the principle upon which the rule is founded. It is, that the entry and possession of the party is notice to the owner of a claim asserted to the land; that the limits of such claim appear from the deed; and that if the owner for twenty years after such entry, and after notice, by means of the possession, that an adverse claim exists, asserts no rights, he may well be presumed to have made some grant or conveyance, co-extensive with the limits of the claim set up; or that, after such lapse of time, a possession, under such circumstances, ought to be quieted.

There should be something more than the deed itself, and a mere entry under it, — something from which a presumption of actual notice

[1] WOODS, J., having been of counsel, did not sit.

may reasonably arise. It is not necessary to show actual knowledge of the deed. Acts of ownership, raising a reasonable presumption that the owner, with knowledge of them, must have understood that there was a claim of title, may be held to be constructive notice; that is, conclusive evidence of notice. 8 N. H. Rep. 264, *Rogers* v. *Jones*. The owner may well be charged with knowledge of what is openly done on his land, and of a character to attract his attention. The presumption of notice arises from the occupation, long continued; and the notice of the claim may well be presumed, as far as the occupation indicates that a claim exists, and the deed, or color of title, serves to define specifically the boundaries of the claim or possession. If the occupation is not of a character to indicate a claim which may be co-extensive with the limits of the deed, then the principle that the party is presumed to enter adversely according to his title, has no sound application, and the adverse possession may be limited to the actual occupation.

Thus cutting wood and timber, connected with permanent improvements, may well furnish evidence of notice that the claim of title extends beyond the permanent improvements, and the deed be admitted to define the precise limits of the claim and possession, provided the cutting was of a character to indicate that the claim extended, or might extend, to the lines of the deed. It might, at least, well indicate a claim to the whole of a tract allotted for sale and settlement, of which the party was improving part, unless there was something to limit the presumption. But no presumption of a claim, and of color of title beyond the actual occupation, could arise respecting other lots than that of which the party was in possession. And where the possession was in a township, or other large tract of land, which had never been divided into lots for settlement, no particular claim, beyond the actual occupation, would be indicated, and of course no notice of any such claim of title should be presumed. 6 Cowen's R. 617, *Jackson* v. *Richards*; 15 Wend R. 597, *Sharp* v. *Brandon*.

If the possession was not of a character to indicate ownership, and to give notice to the owners of an adverse claim, although the grantee might be held to be in possession according to his title, in a controversy with one who should make a subsequent entry without right, his possession ought not to be held adverse to the true owner, to the extent of his deed, merely by reason of the deed itself, even if recorded, nor by any entry under it. There are several cases which tend to sustain this view of the principle. 6 Pick. R. 172, 176, *Poignard* v. *Smith*, 13 Maine R. 178, *Alden* v. *Gilmore*; 4 Mass. R. 415, *Prop'rs of Kennebeck Purchase* v. *Springer*; 4 Vermont R. 155, *Hapgood* v. *Burt*; 1 Peters' R. 41, *Ewing* v. *Burnet*; 2 Greenl. 176, *Little* v. *Megquier*.

We are of opinion that the rule cannot apply to a case where a party, having a deed which embraces land to which his grantor had good title, and other land to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into that part which he could not lawfully convey. There is no notice in

such case to the owner of the land thus embraced in the deed, and no possession which can be deemed adverse to him. If it may be said that the color of title gives such a constructive seisin and possession that the grantee could maintain trespass against any person who did not show a better right, (that is, a title, or prior possession,) there is nothing in the nature of it which can give it the character of a disseisin, or possession adverse to the true owner, so as to bind him. For that purpose, there must be actual possession of some portion of the land of such owner, and that of a nature to give notice of an adverse claim.

It is not necessary to settle whether an entry into an enclosed lot, under a deed purporting to convey unenclosed lands adjoining, belonging to the same person, would operate as a disseisin of the latter. Where two separate lots, included in the same deed, belong to different owners, an entry into one can in no way operate as a disseisin in relation to the other.

The entry into the house lot, therefore, to which Amos Town, who conveyed, had title, was no disseisin of Solomon Town, who had title to the lot unenclosed, on the other side of the road.

The next question is, what entry into the land itself is sufficient.

Here was an entry in 1821, upon the tract in dispute, and a possession, by placing a building on it, by Ebenezer Carleton, the grantor of the defendants. This was, without doubt, an act of ownership. The character of it was adverse to the title of Solomon Town, and it was of a nature to give notice that Carleton claimed title to that land.

But the possession before that time was of a more ambiguous character.

Ebenezer Carleton, to whom the conveyance was made in 1815, made no entry or use of the lot up to 1821, except by laying lumber upon it, or placing farming utensils there. Those acts by one having a deed, if nothing further was shown, might be held to be a sufficient entry and possession to operate as a disseisin of Solomon Town. But it appeared that so far as the laying of lumber on the lot was concerned, this was no more than Carleton, and divers other persons, had been in the habit of doing before, and that others continued to do the same afterwards. Those acts, prior to 1815, were done by him, and others, without claim of title, and of course in subservience to the title of the true owner. If not acknowledged trespasses, they must have been under a license from Solomon Town. The same acts continued after a deed of other lands, by a person having good title to those lands, could not operate as any notice to the owner of this tract, that a deed had been made covering his land also, and that there was an occupation under that deed, or under any claim of right to occupy adversely to him. The additional act of leaving farming tools on the land does not seem to change the character of the possession.

It was not, therefore, until 1821, when the building was removed on to the land, that any entry was made upon it by Carleton, from which Solomon Town, with knowledge of the entry, should have understood

that Carleton made any claim to the ownership of the lot; and until that time, therefore, there was nothing from which an ouster can be inferred, and no possession by him that can be deemed adverse, except at the election of the owner. 21 Pick. 140, *Magoun* v. *Lapham*; 13 Maine, 336, *Thomas* v. *Patten*.

Judgment for the plaintiff.

E. *Disabilities.*

BUNCE *v.* WOLCOTT.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1816.

[*Reported* 2 Conn. 27.]

THIS was a bill in chancery to redeem mortgaged premises. The case was as follows. Ebenezer Benton, Jr., on the 16th of February, 1763, mortgaged the premises to David Beekman and Abraham Lynsen, of the city of New York, to secure to them the payment of £428 12*s*. 6*d*. New York currency, on 20th of March next ensuing. Benton remained in possession until his death, which took place on the 9th of February, 1764. On the 26th of May, 1764, Ruth Benton, the widow of the mortgagor, took letters of administration on his estate, and soon afterwards represented it insolvent, and procured a decree of probate appointing commissioners, and limiting a time for the exhibition of claims. On the 31st of October, 1765, she exhibited to the Court of Probate an inventory of said estate, including one or two small pieces of land, but not including the premises, which was accepted and recorded: and no further proceedings relating to said estate are to be found on the files and records of said court. On the 31st of March, 1768, said Ruth, being then in possession, conveyed to Silas Deane all her right in the premises, in fee, with covenants of warranty and seisin. On the 26th of April, 1770, Beekman and Lynsen, the mortgagees, conveyed the premises to said Deane, by a like deed. On the 2d of April, 1772, Deane conveyed, in like manner, to John Robbins. From him the premises passed, by a quitclaim deed, on the 6th of January, 1778, to his son, Levi Robbins; who, on the 31st of March, 1789, mortgaged them to Thomas Seymour, but on payment of the mortgage money, on the 6th of March, 1798, he obtained a reconveyance. On the 23d of November, 1803, he mortgaged them with other lands to C. C. Deming and C. Barnard; and on the 31st of August, 1808, he conveyed them with other lands to Elihu White, to whom Deming and Barnard released their mortgage. On the 1st of December, 1814, White conveyed them with other lands to the defendant. Under all these conveyances, the grantees respectively, except the several mortgagees, took immediate possession, and remained in possession until alienation.

Ebenezer Benton, Jr., at his death, left a daughter, Elizabeth, who was born on the 10th of June, 1756, and was married on the 19th of January, 1775, during her minority, to Daniel Bunce, one of the plaintiffs, and has ever since remained his wife.

The cause came on to be heard before the Superior Court in Hartford County, September Term, 1816. The plaintiffs, in support of their bill, offered evidence of title in Benton, at the time he made the mortgage. The defendant objected to any inquiry into Benton's title, on the ground that such inquiry was irrelevant, because the right of the mortgagor to redeem could not be enforced in chancery after fifteen years from the time Deane took possession, notwithstanding the minority and coverture of the heir-at-law; and because, under the circumstances of the case, such right must be presumed to have been released and extinguished. By consent of parties, the cause was continued, without any decision upon these points, to the next term, for the purpose of taking, in the mean time, the advice of all the judges thereon.

T. S. Williams and *Johnson*, for the plaintiffs.

Sherman and *Trumbull*, for the defendant.

SWIFT, C. J. Courts have gone great lengths in presuming grants, where it conduced to justice, and quieted men in their possessions.

Mere length of time less than what is prescribed by Statute, and in cases where the Statute operates, can never be a presumptive bar. Length of time, accompanied by circumstances which render it probable a grant was made, may be a presumptive bar. So length of time, unaccompanied by such circumstances, may be a bar where there is no Statute of Limitation, in analogy to Statutes in similar cases. Where a Statute limits a time, it is a peremptory bar, and may be pleaded; but where there is no Statute, length of time is matter of presumptive evidence to be left to the jury, and may be rebutted by circumstances which go to disprove the probable existence of a grant. No presumption of a grant could be made where it would be impossible; as where the supposed grantor had no legal right or capacity to make the grant.

In this case, it is not necessary to presume any act to have been done by an infant, or feme-covert, to quiet the long possession of the defendant, and those under whom he claims. From the circumstance that the land in question was not comprehended in the inventory of Benton's estate, it is highly probable that he had released the equity of redemption in his lifetime, and the deed had been lost. If he did not release it, then it is probable, as the estate was insolvent, it was disposed of in due course of law for the payment of the debts, and the evidence has been lost. This is confirmed by the circumstance, that the mortgagees gave deeds of warranty of the land, and the purchaser went into immediate possession; which would not probably have been done, if the title had not been quieted. To this is to be added the great length of time which has elapsed; and it cannot be supposed that the petitioners, some of whom were *sui juris*, would have been so long silent, if it had been understood that they had any right. Under

these circumstances, there can be no doubt the equity of redemption was extinguished; and though there is no proof of a conveyance, yet we are warranted to presume it.

With respect to the other point, it may be remarked, it has been long recognized in this State, that a Statute of Limitation can never begin to run during the existence of a disability, though when it once begins, it will not be interrupted by an intervening disability. If a female should be an infant when the title accrued, and should intermarry before she comes of age, she would be within the saving of the Statute till she should become discovert; but if being of full age when the title accrued, she should intermarry within fifteen years, she would not be within the proviso of the Statute; so that the same person, in certain cases, could take advantage of two successive disabilities. This doctrine has been sanctioned by a single decision in this court; (*Eaton* v. *Sanford*, 2 Day's Ca. 523;) but, I apprehend, it is not warranted by a sound construction of the Statute. The saving clause is expressly limited to disabilities existing *at the time the title accrued*. Nor is the proposition correct, that the Statute never begins to run against a person under a disability. Suppose that the party claiming is an infant when the title accrues; if fifteen years run during his infancy, he has but *five* years after he comes of full age to make his entry. This clearly shows, that the Statute operates against him during the disability. Indeed, the Statute always begins to run against a man the moment he is disseised, whether he is under a disability or not: all the difference is, that an additional time is allowed where a disability exists, after the removal of it. The correct rule, sanctioned by all the authorities, is, that when the Statute once begins to run, a supervenient disability will not stop it. Hence it follows, that no person can ever take the benefit of two successive disabilities; a construction strictly conformable to the letter and meaning of the Statute. But in the construction heretofore given in this State, a succession of disabilities can be united; old claims may be preserved, till all evidence respecting them is obliterated; and the beneficial objects of the Statute may be defeated. It appears to me, that the case of *Eaton* v. *Sanford* is a departure from principle; that the construction given to the Statute is not warranted by the fair import of it; and that it ought not to be considered as possessing the authority of a precedent.

I am of opinion, on both points, that the bill ought not to be sustained.

EDMOND, J. Two questions are presented for the consideration of the court. One is, whether from lapse of time, and under all the circumstances attending this case, the court may and ought to presume a grant, in order to quiet the respondents in their possession? I do not consider it necessary to determine this question, as the court are unanimous on the other; and that is sufficient to decide the case.

The other is, whether the proviso, or saving in the Statute of Limitations against the right of entry into lands, etc., tit. 97, c. 3, extends to

supervenient disabilities, or to such only as exist at the time the right of entry accrues?

To decide this question, there appears to me no other difficulty than that which arises from the necessity to deny the propriety of a former decision (*Sanford* v. *Eaton*, 2 Day's Ca. 523), — a necessity always to be regretted; or to depart from what I considered, at the time the case of *Bush and Wife et al.* v. *Bradley*, 4 Day's Ca. 298, was argued, and still consider, as the plain and obvious import of the Statute. By the second section, it is enacted, that "no person or persons shall, at any time hereafter, make entry into any lands, tenements, or hereditaments within this colony, but within fifteen years *next after* his or their right or title, which shall hereafter *first descend* or accrue to the same, &c." In this section of the Act there is no saving clause for disabilities of any sort; nor in any other part of the Statute is there any saving against its positive provisions, except what is to be found under the proviso which forms the fourth section. To this, then, we must look, to discover, not who *ought to be*, but *who are*, the subjects of it, and how far their exemption extends. Examined with this view, it appears to me difficult to perceive how it can possibly be construed to apply or extend to any other than those, who, at the *time* of passing the Act, *had*, or thereafter should *have*, "a right or title of entry into any lands," &c. and who "be" (that is, at the time) "or shall be, *at the time of the said right or title first descended, accrued, come or fallen, within the age of twenty-one years;*" or shall, at *the time* of said right or title first descended, accrued, &c, be under some one or more of the disabilities enumerated, and shall prosecute their claims within five years next after the disability or disabilities, which *existed at the time* the right or title first descended, &c., are removed. I say, "disability or disabilities," because a person may be under several of the disabilities specified, *at the time* the title accrues: and in such case, the person so situated may avail him or herself of either; and it will always be a sufficient answer to an objector to such an election, to say, the disability on which *I rely* is pointed out by the proviso; it existed *at the time my right or title accrued;* I have prosecuted my claim within the time allowed after its discontinuance, and come within both the letter and spirit of the law. But where a *single* disability only exists at the time the right of entry accrues, and the five years after the discontinuance of *that* disability have elapsed, the Statute immediately attaches, and the party so neglecting to prosecute can never avail himself of any other or supervenient disability, because the Statute recognizes no other than such as *actually existed*, or should *exist, at the time when the right of entry first commenced;* and every *after* disability may be said to want, and is, in fact, destitute of that essential qualification.

I should advise that judgment be given for the respondent.

SMITH, BALDWIN, and GODDARD, JJ., concurred with Judge EDMOND in waiving a decision upon the question of presumption: and were also of opinion with him and the rest of the court, that the suit not having

been commenced within five years after the termination of the disability which existed at the time the title first accrued, no supervenient disability would save the case from the limitation of the Statute.

BRAINARD, J., concurred with the Chief Justice on both points.

HOSMER, J. The plaintiffs, heirs of the mortgagor, make their application to redeem mortgaged estate. The defendant, a purchaser for valuable consideration, opposes on this ground, that the mortgagees and their assigns, have, for almost half a century, been in the undisputed possession of the estate, using it as their own. It is stated by the parties, that when the title first accrued, Elizabeth Bunce, one of the petitioners, was a minor, and afterwards, before she arrived to lawful age, intermarried with her present husband, and has remained under coverture ever since.

If Elizabeth was, by law, obliged to enter on the premises, within five years after her attaining the age of twenty-one, her right has long since been barred. The Statute for quieting men's estates and avoiding suits, having limited the period of entry on property withheld, to fifteen years, by way of exception provides, that if the person who has right of entry shall, *at the time of the right first descended or accrued*, be within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, such person shall have five years in which to make entry, or bring his action, after the removal of his disability. Of consequence, it has been argued by the petitioners, that as Elizabeth, at the descent of the title in her, was a minor, and before she attained full age, intermarried, and has ever since remained under coverture, the law has not commenced its operation against her. This supposed consequence I utterly deny. It is a conclusion without any premises to authorize it. The proviso of the Statute regards, solely and exclusively, the disabilities existing *at the time of the right or title first accrued*. "If this disability be once removed," to use the words of Ashhurst, J., "the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary." This construction is authorized by the strongest reasons. It is in accordance with the explicit and intelligible expressions of the Statute, which, in so many words, alone embrace disabilities existing at the time *of the right or title first descended or accrued*. At the same time, it best comports with private justice and public convenience. It allows a sufficiently extended range to the Act made *for quieting possession*, and preventing unreasonable delay in the assertion of claims. It avoids the intolerable inconvenience of accumulated successive disabilities, which, for an interminable period, might subvert titles apparently well established, and produce the most ruinous instability. And what is of no small importance, it is in perfect conformity with the judicial decisions of other States. 3 Bac. Abr. 206 (Wils. edit.); *Stowel* v. *Lord Zouch*, Plowd. 356; *Doe d. Count Duroure* v. *Jones*, 4 Term Rep. 300; *Doe d. George et Ux.* v. *Jesson*, 6 East, 80; *Enger et Ux.* v. *Commonwealth et al.*, 4 Mass. Rep. 182.

From the facts agreed on, I am likewise of opinion, that the court is authorized to presume a grant of the equity of redemption to the original mortgagees, or to Silas Deane, their grantee.[1]

TRUMBULL, J., being related to the defendant's grantor with warranty, and GOULD, J., having been of counsel in the cause, gave no opinion.

Judgment to be given for the defendant.[2]

F. *Tacking Interests.*

DOE d. GOODY *v.* CARTER.

QUEEN'S BENCH. 1847.

[*Reported* 9 *Q. B.* 863.]

EJECTMENT for a cottage, garden, etc., in Essex. Demise, January 8, 1845.

On the trial, before *Coleridge*, J., at the Essex Summer Assizes, 1845, it appeared that the defendant was the widow of John Carter, who died in 1834, being then occupier of the premises, which he had held, as after mentioned, for a period short of twenty-one years; and the defendant had occupied them ever since. The other material facts (as stated in the judgment of the court) were as follows: Robert Carter, the father of John, purchased the premises (amongst others) from one Havens, and was let into possession; but, as he did not pay all the purchase-money, no conveyance was executed till December 14, 1824, some years after the purchase. In the mean time the father had let his son John, the husband of the defendant, into possession of part of the premises as tenant at will without paying any rent. The father afterwards mortgaged the whole, on March 23, 1829, for a term of years, now vested in the lessor of the plaintiff. The learned judge directed the jury that, if they believed John Carter, the son, to have entered as tenant at will more than twenty-one years before the day of the demise laid in the declaration, this action was barred by Stat. 3 and 4 W. 4, *c.* 27.[3] Verdict for defendant. *Lush*, in the

[1] The part of HOSMER, J.'s opinion, relating to this point, is omitted.

[2] See *Dunscomb* v. *Wynkoop*, 3 Johns. Ch. 129; *Thorp* v. *Raymond*, 16 How. 247, *accord*. But cf. *Ross* v. *Donnel*, 3 Brev. 438.

[3] §§ 2, 7. — "II. And be it further enacted, that after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

"VII. And be it further enacted, that when any person shall be in possession, or in

ensuing term, obtained a rule *nisi* for a new trial on the grounds of misdirection, and that the verdict was against the weight of evidence. In Trinity Vacation, 1840.[1]

Gurney, showed cause.

Lush, contra. *Cur. adv. vult.*

Lord Denman, C. J., now delivered the judgment of the court.

This rule was moved for on two grounds, — misdirection; and that the verdict was against evidence. As to the latter, we think that there was abundant evidence to show that the defendant's husband, John Carter, entered into possession of all the premises sought to be recovered, as tenant at will to his father, more than twenty-one years before the bringing of this ejectment, which in truth was the only question for the jury.

The case, therefore, depends on the question whether the learned judge misdirected the jury. The facts were (his lordship here stated them as they appear, *ante*). Under these circumstances it was contended for the lessor of the plaintiff that, as the father was himself tenant at will to Havens till December 14, 1824, when that tenancy was determined by the execution of the conveyance, the tenancy at will subsisting between the father and son was determined at the same time. We do not think that consequence followed, but are of opinion that the conveyance to the father had no operation on the tenancy at will between him and the son. Again, it was contended that the mortgage by the father, in 1829, operated as a determination of the will. Assuming this to be so, still the son would thereby become tenant by sufferance, and the twenty years under the late Statute, 3 and 4 W. 4, *c.* 27, having begun to run long before, would continue to run, unless a new tenancy at will or for some other term were created. *Doe d. Bennett* v. *Turner*, 7 M. & W. 226; *Turner* v. *Doe d. Bennett*, 9 M. & W. 643; and, indeed, the same observation would apply if the conveyance in 1824 were treated as a determination of the will. Now there was no evidence in this case from which the jury could draw the conclusion that a new tenancy between the father and the son had been created at any time within twenty years before the bringing of this ejectment; and, therefore, the determination of the will of the father, either in 1824 or in 1829, is not, in truth, material.

Upon the whole, we are of opinion that the learned judge was right in telling the jury that if they believed the son to have entered as tenant at will more than twenty-one years before January 8, 1845 (the day of

receipt of the profits of any land, or of receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make or carry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

[1] June 25th. Before Lord Denman, C. J., Patteson and Williams, JJ.

the demise in the declaration of ejectment), the Statute 3 and 4 W. 4. c. 27, was a bar to the action; and that the jury were right in finding that he did so enter. The rule for a new trial must, therefore, be discharged.

Rule discharged.

DOE d. CARTER *v.* BARNARD.

QUEEN'S BENCH. 1849.

[*Reported* 13 *Q. B.* 945.]

EJECTMENT for a cottage in Essex. Demise, 13 May, 1848.

On the trial before *Coltman*, J., at the Essex Summer Assizes, 1848, it appeared from the evidence given for the lessor of the plaintiff that in 1815 one Robert Carter purchased the premises and was let into possession; but as he did not pay all the purchase-money until 1824, no conveyance was executed till that time. Robert Carter, immediately after his purchase in 1815, allowed his son John to occupy the premises rent free as tenant at will; and he continued so to occupy until 1834, when he died, leaving a widow, who was the lessor of the plaintiff, and a son and other children. Robert Carter, the father, was at that time still living. The lessor of the plaintiff had occupied from the time of her husband's death until a short time before the present action was brought. The defendant claimed under a mortgage made by Robert Carter in 1829. For the defendant it was contended that assuming a title to have been shown in John Carter, the lessor of the plaintiff could not recover. The learned judge directed a verdict for the plaintiff, and reserved leave to the defendant to move to enter a nonsuit.

Chambers, in last Michaelmas Term, obtained a rule *nisi* for a nonsuit, and also for a new trial, on the grounds of misdirection, and that the verdict was against the evidence. In last Trinity Term,[1]

Shee, Serjt., and *Peacock*, showed cause.

Chambers and *Lush*, contra. *Cur. adv. vult.*

PATTESON, J., now delivered the judgment of the court.

The lessor of the plaintiff proved no title, but relied on long possession: viz. her own for thirteen years, and her husband's before her for eighteen years; but in so doing she showed that her husband left several children, one of whom was called as a witness. If the husband's possession raised a presumption that he was seised in fee, that fee must have descended on his child, and of course the lessor of the plaintiff must fail. But she contends that because the husband's possession was for less than twenty years, no presumption of a seisin in

[1] May 25th and 29th. Before LORD DENMAN, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

fee arises; that she is entitled to tack on her own possession to his; and then that the 34th section of Stat. 3 & 4 W. 4, c. 27, which enacts "that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished," has put an end to the right and title of all persons, and transferred the estate to her. If she had been defendant in an action of ejectment, no doubt the non-possession of the lessor of the plaintiff, evidenced by her husband's and her own consecutive possession for more than twenty years, would have entitled her to the verdict on the words of the 2d section of the Act, without the aid of the 34th section. Therefore it is said that the 34th section must have some further meaning, and must transfer the right. Probably that would be so if the same person, or several persons, claiming one from the other by descent, will, or conveyance, had been in possession for the twenty years. But this lessor of the plaintiff showed nothing to connect her possession with that of her husband by right of any sort; and if she be right in her construction of the 34th section, the same consequence would follow if twenty persons unconnected with each other had been in possession, each for one year, consecutively for twenty years; yet it would be impossible to say to which of the twenty persons the 34th section has transferred the title. Without the aid of this Statute, twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years; provided they were less than twenty: *Doe dem. Harding* v. *Cooke*, 7 Bing. 346; and the effect of the 34th section would probably be to give the right to the possessor for twenty years, even against the party in whom the legal estate formerly was, and, but for the Act, would still be, where he had not obtained the possession till after the twenty years; but then we apprehend, as before stated, that such twenty years' possession must be either by the same person or several persons claiming one from the other, which is not the case here.

The lessor of the plaintiff must therefore rely on her own possession for thirteen years as sufficient against the defendant, who has turned her out and shows no title himself. According to the case of *Doe dem. Hughes* v. *Dyball*, Moo. & M. 346, that possession for thirteen years would be sufficient; for in that case the lessor of the plaintiff showed only one year's possession, and yet Lord Tenterden said, "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must show your title." See also *Doe dem. Humphrey* v. *Martin*, Car. & Marsh. 32. These cases would have warranted us in saying that the lessor of the plaintiff had established her case, if she had shown nothing but her own possession for thirteen years. The ground, however, of so saying, would

not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action, but that such possession is *prima facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee. Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was *prima facie* evidence of his seisin in fee; and, as he died in possession and left children, it was *prima facie* evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail; and therefore she has by her own showing proved the title to be in another, of which the defendant is entitled to take advantage. On this ground we think that the rule for a nonsuit must be made absolute.

Rule absolute for a nonsuit.[1]

FANNING *v.* WILLCOX.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1808.

[*Reported* 3 *Day*, 258.]

MOTION for a new trial.

This was an action of ejectment, to which the general issue was pleaded.

On the trial, the plaintiff claimed the land in question as devisee under the will of Thomas Fanning, deceased, to whom it had been appraised and set off under an execution against Joseph Noyes. It was admitted that the plaintiff had a good and legal title, unless barred by the Statute of Limitations.

The defendants were in possession as tenants under Nathaniel Palmer. It appeared that after the levy of Thomas Fanning's execution,[2] Noyes continued in possession until within fifteen years of the time of bringing this action, but had gained no title. Nathaniel Palmer, having no title, then commenced an action of ejectment against Noyes for the land. Noyes suffered judgment to pass against him by default, and abandoned the land; upon which Palmer took possession, without the levy of an execution.

The court, in their charge to the jury, instructed them that if they should find that the plaintiff's record title was complete, and the defendants, or those under whom they claim, had no title of record, yet the law was so that if any other person had been in possession of the land, claiming adversely to the plaintiff's title, and the possession of such

[1] See *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Board* v. *Board*, L. R. 9 Q. B. 48; *Poole* v. *Chever*, 8 All. 89.

[2] It is not expressly stated in the motion that the levy of Fanning's execution took place, and the adverse possession of Noyes commenced, more than fifteen years before the plaintiff brought his action; but this was the fact, and the case proceeds entirely upon the supposition of its existence. — REP.

person, together with the possession of the defendants, and those under whom they claim, amounted to a period of more than fifteen years previous to the commencement of this action, during which the plaintiff was ousted of the possession, he was not entitled to recover. The jury found for the defendants; and the plaintiff moved for a new trial, which motion was reserved for the opinion of the nine judges.

Goddard, in support of the motion.

Ingersoll, contra.

By the Court.[1] Actual ouster and adverse possession of any lands, tenements, or hereditaments, for fifteen years after the title, or cause of action accrued, and before suit brought, bars the plaintiff of his right of entry thereafter, whether the ouster and adverse possession be by the same person or persons, for the whole term of fifteen years, or by different persons for different periods, making fifteen years in the whole; provided the disseisin and adverse possession have been continued and uninterrupted; and provided that the plaintiff does not come within any of the exceptions mentioned in the provisos of the Statute, extending the term of time, in which entry may be made.

New trial not to be granted.[2]

[1] Brainerd and Griswold, JJ., having been concerned as counsel in this cause, did not sit.

[2] "The only other question presented by the case is, whether the Statute of Limitation was a bar to the plaintiff's recovery. It appears that there was a continual adverse possession for more than twenty years, but that Hugh Shannon, who first took the possession of the land in controversy, before he had remained in possession twenty years surrendered the possession to the defendants or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim, and that they had not had the land in possession twenty years prior to the commencement of this suit.

"This circumstance, it is urged on the part of the plaintiff, prevents the Statute from operating as a bar to his recovery. But we cannot perceive any principle upon which it can have such an effect. According to the literal import of the Statute, the plaintiff could only enter upon the land within twenty years after his right of entry accrued, and, consequently, an adverse possession for that length of time will toll his right. Nor can it, in the reason and nature of the thing, produce any difference, whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor whether the possession be held by the same or a succession of individuals, provided the possession be a continued and uninterrupted one." — *Shannon* v. *Kinney*, 1 A. K. Marsh. 3 (1817); and see *Davis* v. *McArthur*, 78 N. C. 357; *Scales* v. *Cockrill*, 3 Head, 432; *Kipp* v. *Supreme Council of Toronto*, 33 U. C. Q. B. 220.

"No privity of *estate* was shown, and if that was necessary, the evidence was improperly admitted. But it was not necessary. It is sufficient if there is an adverse possession continued uninterrupted for fifteen years, whether by one or more persons. This was settled in *Fanning* v. *Willcox*, 3 Day, 258. Doubtless the possessions must be *connected* and *continuous*, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact. Such an agreement to sell and transfer of possession as were set up in this case, if proved, were sufficient." — *Smith* v. *Chapin*, 31 Conn. 530, 531 (1863). See *Asbury Co.* v. *Short*, 13 Ap. Cas. 793.

POTTS *v.* GILBERT.

UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF PENNSYLVANIA. 1819.

[*Reported* 3 *Wash. C. C.* 475.]

THIS was an ejectment to recover 300 acres of land. The plaintiff produced a regular title from the Commonwealth of Pennsylvania, commencing with a warrant in 1784; payment of the purchase money in the same year; return of survey in the year 1788; and a patent in 1800.

The defendant produced a special warrant, dated in 1773, for the same land, to Samuel Clark; and a survey of the same, in 1803, with an indorsement "that it interfered with the survey of Potts," under which the lessee of the plaintiff claimed.

On the part of the plaintiff, it was proved, by the deposition of Jonathan Stevens, a deputy-surveyor, that, in the year 1813, or 1814, the defendant applied to him to know if this land was vacant, saying, that if it was so, he wished to purchase it from the State; if otherwise, he wanted to discover who had the office title. The witness informed him that a warrant for this land had issued to Samuel Clark, in 1773, which had been surveyed in 1803.

On the part of the defendant, the following depositions were read:

N. Hicock, who stated that in 1794, one Eickter sent a person on the land, to build a cabin. In 1793, that there was a sugar bush on it. That part of Eickter's family resided on the land in 1794. In 1795 Gibson, with his family, resided on the premises, in a comfortable house, having a small piece of ground cleared. There has been, ever since, some person on the land, and there is now 20 or 30 acres cleared.

R. Gough deposed, that in 1793 Eickter went on the land, with part of his family; in the fall of the same year Gibson bought him out, and went on; and there has been, ever since, some person on the land, — understood that they claimed only by possession.

J. Lewis deposed, that in July, 1794, Gibson lived on the land — had a good house, and four acres in corn. Gibson bought of one Means, and sold to Dougherty, who lived eighteen years on the land, and then sold to Bowman, who sold to the defendant. There has always been one or more families on the land since he knew it.

The deed from Dougherty to Bowman, dated in 1810, and from Bowman to the defendant, dated in 1813, were given in evidence.

Stacey Potts was examined by the plaintiff, who stated that in 1810 the defendant applied to him to buy this land; but, on account of Clark's survey, he declined selling.

This suit was commenced in the year 1817.

Ingersoll and *Baldwin*, for the defendant.

Tilghman and *Sergeant*, for the plaintiff.

WASHINGTON, J., charged the jury. The only defence, seriously relied upon in this case, is the Act of Limitations; because, as to the title of Clark, it cannot be used against the plaintiff, whose title was perfected in the year 1800, three years before Clark's warrant was even surveyed; and this was not accomplished until thirty years after the date of the warrant; nor was any part of the purchase-money ever paid.

The Statute of Limitations of this State is, in substance, the same as that of 21 Ja. 1, c. 16, and declares that no entry shall be made on land, but within twenty one years next after the right or title to the same descended or accrued.

In the construction of both Statutes, it has always been held that the actual entry of the owner is not necessary to prevent the operation of the law, unless an actual adverse possession is taken by a stranger; from which time, and not before, the limitation begins to run. The grant of land by the government passes at once to the grantee the *legal* possession, as well as the title; which continues until he is disturbed by an *actual adverse* possession. This was decided in the case of *Greene* v. *Liter*, 8 Cra. 229. According to the law, as decided in this State, the title of the Commonwealth vests in the grantee, upon the return and acceptance of his survey, and payment of the purchase-money; and consequently the legal possession must be vested in him at the same time.

The adverse possession, before mentioned, must not only continue, but it must continue the same, in point of locality, during the prescribed period of time, sufficient to constitute it a bar; that is to say, a roving possession from one part of a tract of land to another, cannot bar the right of entry of the owner upon any part of the land which had not been held adversely for twenty-one years, although the different periods of possession of the separate parcels should amount, in the whole, to that number of years. For it is a clear principle of law that the right acquired by the adverse possession of a dissesor, or of one who enters, or retains possession by wrong, can never extend beyond the limits of the particular spot to which his occupation is confined. If he could go beyond these limits, there would exist no other to circumscribe his claim. He cannot resort to the metes and bounds of the tract upon which he has settled, because the legal possession of the owner continues unaffected by the tortious entry, except so far as the actual adverse possession has disturbed it. The legal owner is constructively in possession of the whole tract, because his title extends to the whole. A wrongdoer can claim nothing in relation to his possession by construction.

Whether, to support the possession of a person who enters without title, and who encloses, improves, and cultivates it, and continues the same peaceably for the space of twenty-one years, it is incumbent upon him to show that such possession was taken and continued under *a claim or color of title*, is a question of great importance, and in our

opinion, of no small difficulty. The affirmative of this question seems to be maintained by the learned judges of New York, and the opinion is therefore entitled to our highest respect. Our own mind is not decided upon the point, and as it is not material to the decision of this case, we shall express no opinion upon it.

But the court is perfectly clear, that where different persons enter upon land in succession, each retaining the possession for a period short of twenty-one years, the last possessor, who may be the defendant, cannot tack the possessions of his predecessors to his own, so as to make out continuity of possession sufficient to bar the entry of the owner. The possession of A., the first occupant, cannot be the possession of B., the next occupant; because the moment A. quits the actual possession, the legal possession of the real owner is restored, and the entry of B. constitutes him a new disseisor; and if he seek to bar the entry of the owner, he must show an actual adverse possession, continued in himself for twenty-one years. There is no privity between A. and B.

Neither do we think the present case is strengthened, in favor of the defendant, by the evidence of the witnesses, that the several occupants sold to their successors. Nothing can be more vague than this testimony. It does not state that any conveyances were executed, or what each person sold — whether it was title, possession, or good-will: or whether any two of the sales were applicable to the same spot. Indeed, what had any of them, in point of title, to sell?

Not only is an adverse possession to bar an entry to be confined to the particular parcel so occupied, but some evidence should be given to show the location of such parcel, that it may be seen whether the continuity of possession, during the whole period, was applicable to it or not.

Verdict for plaintiff.[1]

OVERFIELD *v.* CHRISTIE.

SUPREME COURT OF PENNSYLVANIA. 1821.

[*Reported* 7 *S. & R.* 173.]

ERROR to the Court of Common Pleas of Luzerne County, in an ejectment brought by Jacob Overfield against Jerusha Christie and Hugh Osterhout, in which there was a verdict and judgment for the defendants.

The plaintiff gave in evidence an application in the name of Samuel Lefevre, dated the 3d April, 1769, on which a survey was made 4th October, 1773, and a patent issued to Joseph Wharton, 17th August,

[1] See *Jackson* v. *Leonard*, 9 Cow. 563; *Moore* v. *Callishaw*, 10 Pa. St. 224; *Shrenk* v. *Zeisler*, 34 Pa. St. 38; *Doswell* v. *De La Lanza*, 20 How. 29, 32; *Lee* v. *Brown*, 4 Ind. 143; *San Francisco* v. *Fudde*, 37 Cal. 349.

1784. On the 7th June, 1813, Joseph Wharton conveyed to the plaintiff, in consideration of 122 dollars, 50 cents.

The defendants claimed under Nathan Abbott, who made a settlement and improvement in 1788. Abbott sold his improvement to Lazarus Ellis, who sold to Peter Osterhout, deceased, his son-in-law, the husband of Jerusha Christie (daughter of Ellis), one of the defendants, and father of the other defendant, Hugh Osterhout.

The defendants rested their defence on the Act of Limitations; to avoid which the plaintiff gave evidence tending to show that after the death of Osterhout, Mr. Overton, the attorney in fact of Joseph Wharton, was on the land in the year 1812 or 1813, and offered to sell it to the widow Christie (one of the defendants), who was then living on it, who said she was unable to purchase it, and that Mrs. Christie and the plaintiff about the time the plaintiff purchased of Overton, as attorney of Wharton, were in treaty concerning the sums which the plaintiff should pay to her as a compensation for the improvements made by her husband. These matters were submitted to the jury by the President of the Court of Common Pleas, who told them that in order to make defence under the Act of Limitations, it was necessary that there should have been a possession adverse to Wharton's for twenty-one years. The plaintiff contended also that the defendants could not avail themselves of the Act of Limitations, because the persons under whom they claimed were seated on the land under a title derived from the State of Connecticut, and that having shown no title under Pennsylvania, it was to be presumed that their title was under Connecticut. But the judge was of opinion that no such presumption ought to be made, because a settlement under a Connecticut title was *criminal* under the law of Pennsylvania. The judge's charge, which was excepted to by the plaintiff, was placed on the record, and the objections to it were now reduced to three points.

1. That there was error in saying "that it was incumbent on the plaintiff to prove that the defendants claimed under Connecticut."

2. That the judge ought to have instructed the jury that if the defendants entered *without color of title*, their adverse possession was not sufficient to bar the plaintiff from recovering.

3. That he ought to have charged that Nathan Abbott, having entered without title, was a trespasser, and so were all those who came after him; and consequently no continuity of possession, which is essential where one defends himself solely by the Act of Limitations.

Dyer and *Hall*, for the plaintiff in error.

Greenough, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. 1. By the Act of Limitations, 26th March, 1785, no person can support an action to recover the possession of land unless he or the persons under whom he claims have had possession within twenty-one years next before the commencement of the suit. But in order to protect those persons who derived titles from the State

of Pennsylvania against the unlawful possession of those who in contempt of the Government pretended to derive title from the State of Connecticut, it was enacted by the Act of 11th March, 1800, that the Act of 26th March, 1785, "should be repealed, and have no effect within what was called the seventeen townships, in the County of Luzerne, nor in any case where title is or has at any time been claimed under what is called the Susquehanna Company, or in any way under the State of Connecticut, for any lands or possessions within this Commonwealth." The land for which this ejectment was brought does not lie within the seventeen townships, so that the case could only be affected by the defendants claiming under the Susquehanna Company or the State of Connecticut. But there is another Act of Assembly, passed the 25th March, 1813, to be taken into consideration, in order to form a judgment on this case; and from that Act it will appear that whether the defendants derived title under Connecticut or not, was of no importance as regarded the Act of Limitations. By this last-mentioned Act it is provided that in two years from the passing thereof the Act of 11th March, 1800, should be repealed, and the Act of 26th March, 1785 (the general Limitation Act), should, after the expiration of the said two years, be taken and construed to extend as fully and effectually to that part of the Commonwealth, against every person and persons whatsoever, *except those who shall have brought their action for the recovery of their possessions within the said period of two years*, as in any other parts of the same. The policy and intent of this Act are extremely clear. Before the passing of it, the Connecticut claimants had pretty generally submitted to the title under Pennsylvania, the Legislature having made very great and expensive efforts to effect a compromise between those who claimed under the two States. It was therefore thought prudent to restore full effect to the Act of Limitations in that part of the State to which the pretended title under Connecticut extended, taking care at the same time to do justice to the Pennsylvania claimants by allowing them ample time to bring their actions before the Act could attach against them; and for that purpose the period of two years was judged sufficient. Now the plaintiff's action was not commenced within two years, and therefore to him it was perfectly immaterial whether the defendants had claimed under Connecticut or not. It is unnecessary, then, to inquire whether the judge was right or wrong in saying that the law implied no presumption of a claim under Connecticut, the point being irrelevant. Even if the fact of such a claim had been conceded, the plaintiff would have been bound, not having brought his action within two years. I do not mean, however, to insinuate any doubt of the correctness of the charge on this point. I incline to think it was right.

2. I cannot perceive the force of the second objection. It grants the possession to be adverse, and yet calls for something more, — for some *color of title*. To be sure, if a man enters without pretence of title of any kind into land which he knows to be appropriated, there is

considerable reason to suppose that he does not mean to deny the title of the owner, but merely to occupy the land, with an intent to become a purchaser; especially if the owner lives at a distance. But this presumption may be rebutted by proof that he set the owner at defiance. Whether Abbott knew of the survey on Lefevre's application, when he first settled, does not appear. If he did not, he no doubt intended to hold for himself against the world. I think, however, that the judge put that matter fairly to the jury, upon the fact, of *adverse possession or not*.

3. As to privity between trespassers. If one enters and commits a trespass, and then goes off, and another comes after him, and commits a trespass, I grant that there is no privity between these persons, nor can the possession be said to be transferred and continued from one to the other. But I cannot see that the present case falls within that principle. Here has been a possession of four or five and twenty years, transferred in the two first instances for a valuable consideration, and finally transferred from father to son. Each new possessor has been substantially connected with his predecessor. The law pays great regard to a possession transmitted from father to son; so great, indeed, that where there was a *disseisin* and *a descent* to the heir of the disseisor, the entry of the disseisee was at common law taken away. Lord Mansfield has told us that of *seisin* and *disseisin* very little was known in his time *but the name*. In Pennsylvania we certainly have not been in the habit of going deeply into that antiquated subject; nor is it material to inquire whether Abbott or those who came after him acquired a *seisin* according to the strict import of the term. Our law permits all persons, whether in or out of seisin or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt that one who enters as a trespasser, clears land, builds a house, and lives in it, acquires *something which he may transfer to another;* and if the possession of the two added together, amounts to twenty-one years, and was *adverse to him who had the legal title*, the Act of Limitations will be a bar to his recovery. It would be extraordinary indeed if a possession acquired without force could not be transferred, when we hold that *prior possession alone is good title to recover in ejectment* against all but him who shows better title. But when possession has been continued for a number of years, and has passed from hand to hand for valuable consideration, or by descent from parent to child, it has something respectable in it. The argument of the plaintiff leads plainly to this consequence, — that the Act of Limitations can never take effect in favor of a defective title, unless one man lives twenty-one years; because every one who enters under a defective title is a trespasser, and being a trespasser, he cannot, according to the doctrine contended for, transfer his possession to another, or even transmit it by descent to his heir, so as to make a connected continued possession. If that be the case, there is little use in the Act of Limitations. But I

am decidedly of opinion that the law is not so, and that it was well laid down in the charge of the Court of Common Pleas. The judgment should therefore be affirmed.

Judgment affirmed.[1]

SAWYER *v.* KENDALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1852.

[*Reported* 10 *Cush.* 241.]

WRIT OF ENTRY to recover a tract of land in Waltham.

The demandant claimed title through Nancy Brown, one of the heirs-at-law of Samuel Stearns, by deed dated March 27th, 1848. At the trial in this court before *Bigelow*, J., it appeared that said Samuel Stearns, owning a farm in Waltham, including the premises in dispute, died in 1817; that in 1820 partition of his real estate among his heirs-at-law was duly made by commissioners appointed by the Supreme Court, and that the premises now demanded were set to Nancy Brown, the grantor of the demandant, and some of the adjacent land was set to the tenant, another heir-at-law. It also appeared that at the time of said partition, the premises in controversy, and the parcel of land set to the tenant, were in common, and enclosed by one fence and enclosure, and have ever since so remained, until since the date of the conveyance to the demandant. At the date of said partition, the tenant was a married woman, and so remained until 1832, when her husband died intestate. Since his death she has remained a widow. The land set to the tenant as above stated, and also the demanded premises, were mostly used as pasture land, and were approached in two ways, both of which led across the latter. The tenant proved that during the life of her husband the premises in dispute, and the parcel set to her, had been used by him, and since his death by her, by turning cattle into the parcel set to the tenant; and that they thence went into and depastured the tract in controversy. It also appeared that the tenant had gathered apples from the trees on the latter place, and driven cattle over and across the same. This use, as aforesaid, was exercised by the husband of the tenant from 1820 till 1832, and from that time till the date of the writ, by the tenant herself; more than thirty years in the whole.

The deed from Nancy Brown to the demandant first gave a description by metes and bounds, and then added, "All these measurements being according to a plan made by A. Moore, dated March, 1848, to which reference is made; meaning and intending to convey all that

[1] In South Carolina it has been held that an heir can tack his possession, *Williams* v. *McAliley*, Cheeves, 200 (1840); but that a purchaser cannot, *King* v. *Smith*, Rice, 10 (1838).

See *Haynes* v. *Boardman*, 119 Mass. 414.

lot or lots of land set off to me as my part of the estate of Samuel Stearns, deceased, that bound upon Thomas Wright, Hannah Kendall, and land now held by N. Plympton, and by the same bounds as stated by the commissioners who discharged that duty in their report to the Supreme Judicial Court, except in so much as embraces the line or lines near the dower set off to Mary Stearns, my mother. These last lines or line to be agreeably to the plan of A. Moore, and not as stated by the commissioners."

And it appeared that the boundary lines and plan mentioned and described in said deed did not include the demanded premises, but that the partition before referred to, and mentioned in said deed, did. The tenant thereupon asked the judge to rule that the demanded premises were not therein so described as to convey them to the demandant. But the judge ruled that the deed from Nancy Brown to the demandant conveyed all the premises set off to her by the partition aforesaid, as one of the heirs of Samuel Stearns, and that it being admitted by said partition that the demanded premises were set off to said Nancy Brown, the deed from her to the demandant conveyed the land in question.

The tenant then contended that she had acquired a good title to the demanded premises as against said Nancy Brown and her grantees, by an adverse use, by her husband during his lifetime, and by herself since his decease, and on this question wished to submit the case to the jury; but it appearing that the use, if otherwise sufficient, had not continued in the tenant for twenty years, and that she could claim title thereby, only by tacking her husband's possession during his lifetime to her own since his decease, in order to make twenty years, the judge was of the opinion that the tenant could not maintain her defence on this ground.

A verdict was therefore taken for the demandant, which is to be set aside, if the foregoing rulings, or either of them, are erroneous.

J. P. Converse (*A. H. Nelson* with him), for the tenant.

J. Q. A. Griffin (*G. F. Farley* with him), for the demandant.

Bigelow, J. The only title to the demanded premises, set up by the tenant, is one alleged to have been acquired by disseisin. To maintain this, it was proved that the husband of the tenant occupied an estate adjoining the premises in dispute, in the right of his wife, for about twelve years, and in connection with this occupation of his wife's land, that he also occupied during the same period, the parcel of land now claimed by the demandant. It also appeared, that the husband died intestate, and that upon his death, his wife continued the occupation of her own land, and of the premises in dispute, in like manner, until the present suit was brought, being a period of about eighteen years. Upon these facts the tenant claimed the right to annex her own possession to that of her husband, and thus establish an adverse use of the demanded premises for twenty years and upwards. The main question in the case is, whether this right can be maintained.

The general rules of law respecting successive disseisins, are well settled. To make a disseisin effectual to give title under it to a second

disseisor, it must appear that the latter holds the estate under the first disseisor, so that the disseisin of one may be connected with that of the other. Separate successive disseisins do not aid one another, where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate; their several consecutive possessions cannot be tacked, so as to make a continuity of disseisin, of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have been a privity of estate between the several successive disseisors. To create such privity, there must have existed, as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or devisor and devisee. In such cases, the title acquired by disseisin passes by descent, deed, or devise. But if there is no such privity, upon the determination of the possession of each disseisor, the seisin of the true owner revives and is revested, and a new distinct disseisin is made by each successive disseisor. *Potts* v. *Gilbert*, 3 Wash. C. C. 479; *Ward* v. *Bartholomew*, 6 Pick. 409; *Allen* v. *Holton*, 20 Pick. 458, 465; *Melvin* v. *Proprietors of Locks and Canals*, 5 Met. 15, 32; *Wade* v. *Lindsey*, 6 Met. 407.

Applying these familiar principles to the case at bar, it will be found that the tenant shows no continuous disseisin of the demanded premises, of sufficient length of time to bar the true owner, because she cannot connect her own disseisin with that of her husband's. As to the parcel of land in dispute, there was no privity between herself and her husband. He occupied it during his life, not by right of his wife, but by virtue of his own act of disseisin. His wife could commit no act of disseisin, till her coverture ceased by his death. She shows no deed or devise of the land to herself by her husband. Upon his death, therefore, the seisin was in his heir-at-law, or the seisin of the true owner revived, and the subsequent disseisin by her was her own separate act, unconnected with the previous disseisin of her husband. The tenant therefore fails to establish any title in herself to the demanded premises.

It was urged by the counsel for the tenant, that the right of the wife to dower, in land of which her husband died seised, would create sufficient privity of estate between them in regard to the land in question, to enable her to connect his possession of it with her own. But the answer to this suggestion is obvious. The right of dower confers no title to any part of the husband's land after his death, until assignment of dower is made. Until then, the wife has no seisin, or right of entry, in any part of her husband's land, and the heir can well maintain his writ of entry against her, to which her claim of dower would constitute no defence. Park on Dower, 334; *Hildreth* v. *Thompson*, 16 Mass.

191. It is a mere right, which does not ripen into a title, until some specific portion is set out and assigned as dower. If, therefore, such assignment would create a privity of estate with the husband, in the land so assigned, it is very clear that none such exists before assignment made. In the present case, it is not pretended that the demanded premises have ever been assigned as dower to the tenant.

The remaining objection to the demandant's right to recover is, that he shows no title to the land claimed, because the description in the deed from Nancy Brown to the demandant, by metes and bounds, does not include the demanded premises, and that the particular description is not to be controlled by the reference in the deed to the partition of the estate by the commissioners, and the bounds therein given, which do comprehend the premises in dispute. The principle on which this objection rests, is well founded, and were it applicable, would be decisive of this case. But upon comparing the metes and bounds given by the deed, with the plan referred to, upon which they are laid down, and which is also made a part of the particular description, it will be found that they do not correspond, and that it is impossible to trace out and mark the granted premises with intelligible certainty, by following the description contained in the deed. By reason of some unexplained error, the metes and bounds in that part of the description which applies to the demanded premises, are wholly uncertain, and it is impossible to ascertain by them the precise land granted by the deed. It is not a case, therefore, of two inconsistent descriptions, in which the general must yield to the particular, but of an uncertain and impossible description, which must be controlled by an intelligible, though general description, given by a reference to the grantor's title by partition. *Melvin* v. *Proprietors of Locks and Canals*, 5 Met. 15, 28.

Judgment on the verdict for the demandant.

McNEELY *v.* LANGAN.

SUPREME COURT OF OHIO. 1871.

[*Reported* 22 *Ohio St.* 32.]

ERROR to the Court of Common Pleas of Hamilton County, reserved in the District Court.

The original action was brought by the plaintiffs in error to recover a strip of ground three feet wide, fronting on Longworth Street, in the city of Cincinnati.

The defence relied on was the Statute of Limitations. The case was submitted to the court upon the following agreed statement of facts: —

AGREED STATEMENT OF FACTS.

Jane McNeely et al. v. *Thomas Langan.* } No. 32,026. Hamilton Common Pleas.

It is hereby agreed between the parties that Stephen Burrows, on the 1st day of January, 1842, leased perpetually to R. G. Masterson the following described premises, to which the said Burrows had a good title in fee simple, viz.: beginning at a point in the south line of Longworth Street as continued, and the east line of a lot of ground lately belonging to the estate of Samuel Still, deceased, extending thence south with said east line eighty feet, more or less, to the north line of a ten-foot alley; thence east along the north line of said alley twenty-three feet; thence north parallel with said Still's east line aforesaid eighty feet, more or less, to the south line of Longworth Street as aforesaid; thence west along the south line of Longworth Street twenty-three feet to the beginning. That R. G. Masterson conveyed said lot and leasehold to Joseph More, May 20, 1850; said More to E. P. Cranch, April 10, 1854; and said Cranch to the defendant, Thomas Langan, August 29, 1860. It is hereby further agreed that said Masterson, on or about May, 1842, built a frame cottage on the west line of said lot and on the land described in the petition. It is further agreed that the plaintiffs are the owners of said land described in their said petition, if the same does not belong to the defendant by occupancy. It is further agreed between the parties that the land described in their petition was not conveyed by deed to Masterson, nor by Masterson to More, nor from More to Cranch, nor from Cranch to the defendant, Langan. That the said Masterson, at the time of taking possession under his lease from Burrows, entered into the possession of the premises described in the petition, fenced it in with the other property, built his house partly thereon, so as to occupy these three feet as above stated; and the said Masterson, More, Cranch, and the defendant, Langan, have, by transfer of possession made at the time of the several conveyances above mentioned, remained in continuous possession and actual occupancy of said premises and cottage, including said three feet, from May, 1842, to the present time. That neither the plaintiffs, nor those under whom they claim, nor the defendant, nor those under whom he claims, were aware of any question as to the title to this strip of three feet, nor as to any error made in the original location of said cottage and fencing, until October, 1860, when, by a survey then made, it was discovered by the plaintiffs that these three feet were not included in the perpetual lease made to Masterson; and thereupon the plaintiffs, in the year 1865, made, for the first time, a demand upon the defendant for the possession thereof, which was refused then as it is now, and hence this suit.

WM. DISNEY, *Attorney for Defendant.*
S. CLARK, *Plaintiffs' Attorney.*

The court found in favor of the defendant, and rendered judgment accordingly.

The plaintiffs filed a petition in error in the District Court, asking a reversal of the judgment on the general grounds that the court erred in allowing the defendant the benefit of the Statute of Limitation.

The case was reserved by the District Court for decision by this court.

Stephen Clark, for the plaintiffs in error.

William Disney, for defendant in error.

WHITE, J. By the agreed statement, the court below was warranted in finding the possession to have been sufficiently open, notorious, and adverse to bring it within the operation of the Statute of Limitations. The question is, whether it was, in a legal sense, continuous.

For the plaintiff in error, it is contended that the continuity of possession was broken by each successive transfer of the premises in controversy; and, consequently, that as neither the defendant nor any one occupier under whom he claims held possession for the period of limitation, the Statute is not available as a bar to the action.

There are authorities supporting this view; but we think the better reason, as well as the weight of authority, is against the position. *Fanning* v. *Willcox*, 3 Day, 258; *Smith* v. *Chapin*, 31 Conn. 531; *Shannon* v. *Kinny*, 1 A. K. Marsh. 3; *Chilton* v. *Wilson's Heirs*, 9 Humph. 399; *Cuningham* v. *Patton*, 6 Barr, 355; *Schertz* v. *Fitzwater*, 5 Ib. 126; *Overfield* v. *Christie*, 7 Serg. & R. 173; *Johnson* v. *Nash's Heirs*, 15 Texas, 419; *Alexander* v. *Pendleton*, 8 Cranch, 462.

Possession itself is a species of title, of the lowest grade, it is true; yet it is good against all who cannot show a better, and by lapse of time may become, under the Statute, perfect and indefeasible.

In considering the question before us, it should be observed that, in this State, it is not necessary to the running of the Statute that possession be held under color of title. Where there is possession of the requisite character, the question, whether there is color of title or not, is wholly immaterial. *Lessee of Paine* v. *Skinner*, 8 Ohio, 167; *Yetzer* v. *Thoman*, 17 Ohio St. 130.

The possession must be connected and continuous. But it is admitted that the possession will descend to the heir without interrupting the running of the Statute; and we see no good reason why the ancestor may not voluntarily dispose of a possessory interest, which the law, in the absence of such disposition, will transmit to the heir.

The mode adopted for the transfer of the possession may give rise to questions between the parties to the transfer; but as respects the rights of third persons against whom the possession is held adversely, it seems to us to be immaterial, if successive transfers of possession were in fact made, whether such transfers were effected by will, by deed, or by mere agreement either written or verbal.

Judgment affirmed.[1]

[1] See *Chapin* v. *Hutchinson*, 59 Me. 536; *Weber* v. *Anderson*, 73 Ill. 439.

SECTION II.

PRESCRIPTION.

NOTE. — Several of the earlier cases on Prescription are reported only in Serjeant Williams's note to *Ford* v. *Ford*, 2 Wms. Saund. 172, 175, as follows: "In *Lewis* v. *Price*, Worcester Spring Assizes, 1761, which was *an action on the case* for stopping and obstructing the plaintiff's lights, WILMOT, J., said, that where a house has been built forty years, and has had lights at the end of it, if the owner of the adjoining ground build is against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally *some agreement* between the parties; and he said *that twenty years is sufficient to give a man a title in ejectment*, on which he may recover the house itself; and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house. So in an action on the case for stopping up ancient lights, the defendant attempted to show that the lights did not exist more than sixty years; WILMOT, C. J., said, that if a man has been in possession of a house with lights, belonging to it for fifty or sixty years, no man can stop up those lights: possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right, the highest writ in the law. If my possession of the *house* cannot be disturbed, shall I be disturbed in my *lights?* It would be absurd. But the action can only be maintained for damages so far as the lights originally extended, and not for an increase of light by enlarging the windows recently; and I should think a much shorter time than sixty years might be sufficient; but here there has been a possession of that time. *Dougal* v. *Wilson*, Sittings C. B. Trin. 9 Geo. 3. So in an action on the case for obstructing a way, the plaintiff proved that F. was seised of the plaintiff's tenement and the defendant's close, and in 1753, conveyed the tenement to the plaintiff *with all ways therewith used*, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from F. for three lives made in 1723, by which F. demised the field in question in as ample a manner as one R. a former tenant held it, and in the lease there was no exception of a way over the close. YATES, J., held that by the lease without any reservation the way was gone, and therefore could not pass under the words *all ways;* but as thirty years had intervened between the defendant's lease and the plaintiff's conveyance, *and the way had been used all the time*, that was sufficient to afford *a presumption of a grant* or *license* from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass. Bull. Nis. Pri. 74, *Keymer* v. *Summers*. If *trespass* be brought against a person for using a way under similar circumstances, as he cannot *prescribe* for the way, he must justify under a non-existing *grant*, and so excuse a *profert*. As where in trespass *quare clausum fregit* in B., the defendant justified under a grant of a right of way over B. by a deed lost by time and accident; and on issue joined on a traverse of the grant, it appeared in evidence that the way had been used *adversely*, and not by leave and favor, for twenty years and more, over the close B. Which adverse user of the way for so long a period, the learned judge at the trial thought sufficient to leave to the jury to presume a grant; and the Court of K. B. on a motion for a new trial confirmed his opinion. 3 East, 294, *Campbell* v. *Wilson*. This is a strong case: for the grant must be presumed to have been made within twenty-six years, because at that time all former ways had been extinguished by the operation of an Enclosure Act. So in an action on the case for obstructing the plaintiff's lights, who proved an uninterrupted possession of

thus for twenty-five years past: *Gould*, J., who tried the cause, then called upon the defendant to show if he could answer this, because, if unanswered, he thought it sufficient to establish the plaintiff's case. The defendant upon this offered a grant from the former owner of the defendant's premises to the plaintiff's predecessor, dated June, 1750, by which he granted him liberty to put out a particular window, and argued that having this grant and no other, it must be presumed that the plaintiff never had any other, and this would be an answer to the presumption arising from length of possession. The judge thought the grant would not alter the case, as it related to a particular window, which was not included in the present action, and no exception of any other, or reference was mentioned in the grant. The defendant then relied on the possession previous to these twenty-five years; but the judge said that would not avail them; he thought twenty years' possession unanswered was sufficient, and if the defendant had any evidence to explain the possession within twenty years, to show it was limited, or modified, or bad in its commencement, that would be material; the defendant offered none such, and there was a verdict for the plaintiff; the judge however reserved the point of law if the defendant thought fit to move the court. Afterwards a rule to show cause why there should not be a new trial was obtained on the ground of a misdirection; because the judge told the jury that so long an enjoyment was sufficient to give the plaintiff a right to them, although the defendant offered to prove that there were no lights there previous to that time; but that this evidence was not received; and the counsel for the rule insisted that the judge had called the twenty-five years' possession an absolute bar, incapable of being overturned by any contrary proof, where it was only a presumptive proof which might be explained away; that it was a matter of fact for the jury, but the judge left nothing to the jury, treating it as a matter of law. LORD MANSFIELD. I think there must be some mistake in the statement of what passed at the trial; the enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar*, like a Statute of Limitation; it is certainly a *presumptive bar* which ought to go to a jury. Thus in the case of a bond, there is no Statute of Limitations that bars an action upon it, but there is a time when a jury may presume the debt to be discharged, as if no interest appear to have been paid for sixteen or twenty years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence; for so it was held in the case of the *Mayor of Kingston upon Hull* v. *Horner*, Cowp. 102. In a case before me at Maidstone, I held length of time, when unanswered and unexplained, to be a bar. WILLES, J. There was a case before me at York where I held uninterrupted possession of a pew for twenty years to be presumptive evidence merely, and that opinion was afterwards confirmed in the Court of Common Pleas. ASHHURST, J. I should have thought it was the duty of the counsel for the defendant to have told the judge that this evidence was only a presumptive, not an absolute bar; (to which it was answered by Coke, of counsel for the defendant, that it was so, and a case was cited where forty years were held not to be an absolute bar.) BULLER, J. I incline very much to think that the judge was misunderstood, for he could never call it an absolute bar. In the *Wells Harbor Case* this court went fully into the doctrine, and the rule of law is clear, that length of time is presumptive evidence only. The judge said, 'I think twenty years' uninterrupted possession of those windows, is a sufficient *right* for the plaintiff's enjoyment of them.' Now that expression is open to a double construction. If the judge meant it was an absolute bar, he was certainly wrong; if only as a presumptive bar, he was right. The court seemed much inclined to discharge the rule, but the counsel for the defendant pressing it much, it was made absolute. However, the next day BULLER, J., said that ASHHURST, J., had waited on MR. JUSTICE GOULD, who said he never had an idea but it was a question for a jury; and would have left it to the jury, if the counsel for the defendant had asked it; that he compared it to the case of [illegible] and I found me out here of, but not an actual conversion. *Rede* [illegible] *Jeffreys* v. *Upton*, M. L. 26 Geo. 3, K. B."

"In an action on the case, *Stansell* v. *Jollard*, B. R. Trin. 43 Geo., III., MS., *Lawrence*, J., for digging so near the gable-end of the house of the plaintiff, let to a tenant, that it fell; Lord Ellenborough held, that where, as in the case before the court, a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or as it were of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support; but that it was otherwise of a house, &c., newly built." — 1 Selw. N. P. (11th ed.) 457.

"I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament." — *Per* Lord Ellenborough, C. J., in *Bealey* v. *Shaw*, 6 East, 208, 215 (1805). He repeated the remark in *Bulston* v. *Bunstal*, 1 Camp. 463, 465 (1808).

"If the plaintiff has enjoyed the support of the land of the defendant for twenty years to keep up his house, and both parties knew of that support, the plaintiff had a right to it as an easement, and the defendant could not withdraw that support without being liable in damages for any injury that might accrue to the plaintiff thereby." — *Per* Parke, B., *Hide* v. *Thornborough*, 2 C. & K. 250, 255 (1846).

DANIEL *v.* NORTH.

King's Bench. 1809.

[*Reported* 11 *East*, 372.]

The plaintiff declared in case, upon his seisin in fee of a certain messuage or dwelling-house in Stockport, on one side of which there is and was and of right ought to be six windows; and stated that the defendant wrongfully erected a wall 60 feet high and 50 in length near the said house and windows, and obstructed the light and air from entering the same, &c. At the trial before the Chief Justice of Chester it appeared that the plaintiff's premises, which adjoined those of the defendant, were in 1787 altered by the then occupier, and the windows in question (though somewhat altered since) were then put out towards the defendant's premises; and such windows then received the light and air freely over a low bakehouse, which was before that time, and continued till within the last three years to be, tenanted by one Ashgrove, under Sir George Warrender, from whom the present defendant claimed; upon the site of which bakehouse the defendant, who succeeded Ashgrove, built the erection complained of about two years ago, which was considerably higher than the old bakehouse, and darkened some of the plaintiff's windows; but would have been no injury to the plaintiff's premises, if they had continued in their original state, before the alterations which took place while Ashgrove rented under Sir George Warrender the premises now held by the defendant. There was other evidence given at the trial; but ultimately the question made then, and afterwards argued before this court, was whether Sir George Warrender, the then reversioner of the premises occupied by Ashgrove, were bound by his tenant's acquiescence for above twenty years in the

windows put out by the then occupier of the plaintiff's premises against the defendant's premises. It was insisted at the trial that the defendant, standing in the place of the reversioner, was not bound by such acquiescence of the former tenant; but this was overruled by the court below, and the plaintiff recovered a verdict.

Manley, Serjt., obtained a rule *nisi* for a new trial, on the ground of the misdirection of the court.

Topping and *J. Williams*, showed cause against the rule.

Lord Ellenborough, C. J. The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there were some probable means of his knowing what was done against him. And it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by the tenant of Sir George Warrender, though for twenty years, without the knowledge of the landlord, will bind the latter. And there is no evidence stated in the report from whence his knowledge should be presumed.

Grose, J., of the same opinion.

Le Blanc, J. The objection was taken at the trial, that the landlord was not bound by the acquiescence of his tenant, without his knowledge, though for twenty years; but that was overruled, and it was considered as a rule of law that the landlord was so bound. It is true, that presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances alluded to of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him: but the same cannot be said of lights put out by the neighbors of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake.

Bayley, J. The tenant cannot bind the inheritance in this case, either by his own positive act or by his neglect. If indeed the landlord had known of these windows having been put out, and had acquiesced in it for twenty years, that would have bound him; but here there was no evidence that he knew of it till within the last two years.

Rule absolute.[1]

[1] *See Parker* v. *Richardson*, 4 B. & Ald. 579 (1821).

CROSS *v.* LEWIS.

KING'S BENCH. 1824.

[*Reported* 2 *B. & C.* 686.]

CASE for erecting a wall near plaintiff's ancient windows, and obstructing the light and air. Plea, Not guilty. At the trial before *Holroyd*, J., at the last Lancaster Assizes, it appeared that the plaintiff was possessed of a house in the town of Blackburn, with a yard about four feet wide on one side of it bounded by a wall, and there were several windows looking in that direction. No evidence was given as to the time when the house was built, but some of the witnesses had known it for thirty-eight years, and the windows in question had existed during all that period. In 1821 the defendant bought the premises adjoining the plaintiff's yard, and built a house thereon, coming within five feet of the plaintiff's wall, and which darkened the windows opening in that direction. For a long time before the adjoining premises were purchased by the defendant, they had belonged to a family named Heber, and there was not any evidence to show that any member of that family had ever been at Blackburn, or had ever seen the premises, which had been for twenty years next before the sale in possession of the same tenant (Mrs. Percy), but whether they were held from year to year or for a term of years, was not proved. For the defendant it was objected, first, that from the situation of the premises, the plaintiff's windows not being at the extremity of her land, the presumption of a grant of a right to have windows in that direction did not arise; and, secondly, that the doctrine of presumption could not apply to this case, for want of evidence to show that the owner of the adjoining premises knew that the windows had been opened. The learned judge thought, that upon the evidence, the windows were to be considered as ancient windows, and directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

J. Williams now moved accordingly.

ABBOTT, C. J. In the case of *Wood* v. *Veal*, 5 B. & A. 454, it appeared that a lease for ninety-nine years had been granted, and that as long as living memory went, all persons had been accustomed to go upon the *locus in quo* at their pleasure; and I left it to the jury to say, whether there had been a dedication to the public before the lease was granted. The expressions there used as to what would or would not bind the landlord, were intended to be applied to the case then before the court, not generally; and I do not see any reason to retract them. In the present case I think that the position of the plaintiff's house, upon which one point has been made, is of no importance. In actions for obstructing light no question was ever before made, as to whether the windows were or were not opened at the extremity of the plaintiff's

land, nor was it ever imagined that his rights could be varied by that circumstance. As to the second point, if it had appeared in evidence that the windows were opened during Mrs. Percy's tenancy, there would have been much weight in the argument which has been urged for the defendant. Or if the evidence of Mrs. P.'s tenancy had gone as far back as that of the existence of the windows, it would have been material to inquire, whether at that time they had or had not the appearance of ancient lights. But upon this evidence it must be taken, that they were ancient lights, existing before Mrs. P.'s tenancy commenced, and every presumption must be made in favor of them. For these reasons, I think that the direction of the learned judge was right, and that we ought not to disturb the verdict found for the plaintiff.

BAYLEY, J. I am of opinion that a proper direction was given to the jury in this case. I do not say that twenty years' possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of *Darwin* v. *Upton* [2 Saund. 175 b, n. 2] it has been held, that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it. In *Beaty* v. *Shaw*, 6 East, 208, Lord Ellenborough says, "I take it, that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right, in the party so enjoying it, derived from grant or Act of Parliament." It has been argued, that in order to found such a presumption, it must be shown, that the first act was illegal. If so, the doctrine of presumption can never apply to windows, for a person building a house, even at the extremity of his own land, may lawfully open windows looking towards the adjoining property. If his neighbor objects to them, he may put up an obstruction, but that is his only remedy; and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them. This case is much stronger, the right is proved to have existed for thirty-eight years; the commencement of it is not shown. It is possible that the premises, both of the plaintiff and defendant, once belonged to the same person, and that he conferred on the plaintiff, or those under whom she claims, a right to have the windows free from obstruction. *Daniel* v. *North* [11 East, 372] has been relied upon to show that the tenancy of Mrs. Percy rebutted the presumption of a grant; but this is a very different case; her tenancy was shown to have existed for twenty years, but the origin of the plaintiff's right was not traced.

LITTLEDALE, J. It makes no difference in this case that the windows were not at the extremity of the plaintiff's land; for, unless something be shown to restrain his right, a man may, at the extremity of his land, put out windows looking in any direction whatever; and for that reason the vendor of land for building, not unfrequently takes a covenant to restrain that right. The case of windows is, therefore, always different from the exercise of a right of way or of common; for there, if the thing be done without a right, an actual trespass is committed. As to

the second point, it was proved, that the windows had existed for thirty-eight years, and Mrs. Percy's tenancy for twenty. How the land was occupied for eighteen years before that time did not appear. I think that quite sufficient to found the presumption of a grant, and that this verdict ought not to be disturbed.

Holroyd, J. At the trial I considered the windows in question as ancient lights, and that the plaintiff had by law a right to enjoy them, and that it was not a question to be determined by the jury, without some evidence to contradict the idea of their being ancient lights. In *Daniel* v. *North* this view of the question could not be taken, for the putting out of the windows was proved. A stream of water is at first the property of each person through whose land it flows; but the water may be appropriated by an individual, and after he has enjoyed it for a certain length of time, that enjoyment cannot be interrupted, although it might at first have been prevented. So a man may on his own land erect a house, with windows looking towards his neighbor's premises; at first they may be obstructed, but if no interruption is offered, he may at length prescribe for them as ancient windows, and claim to have them free from obstruction, as in *Bland* v. *Moseley*, cited in *Aldred's Case*, 9 Co. 57.

Rule refused.

LIVETT *v.* WILSON.

Common Pleas. 1825.

[*Reported* 3 *Bing.* 115.]

Trespass for breaking and entering the plaintiff's close, called The Yard, in the parish of St. Andrew, in the town of Cambridge.

The defendant pleaded that before and at the said several times when, &c., he was seised in his demesne as of fee of and in a certain messuage and yard in the parish aforesaid, and that long before any of the several times, when, &c., to wit, on January 1st, 1764, at the parish aforesaid, by a certain deed then and there made between John Waterfield, the then owner of the said close of plaintiff called The Yard, and who was then seised thereof in his demesne as of fee, and Thomas Blanks and Mary his wife, who were then seised in their demesne as of fee, in right of the said Mary, of and in the messuage and yard, now of defendant, and whose estates therein he, defendant, now hath, but which said last-mentioned deed hath since been lost and destroyed by accident, and, therefore, cannot be produced to the court here, and the date whereof is for that reason wholly unknown to defendant, the said John Waterfield so being owner of the said close, in which, &c., did grant to the said Thomas Blanks and Mary his wife, in right of the said Mary, so then being the owner of the said messuage and yard, now of defendant, and to the heirs and assigns of the said Mary as afore-

said, a certain way from the public highway or street called the Petty Cury, into, through, over, and along the said close called The Yard, in which, &c., into and into the said messuage and yard of defendant, and so back again from the said last mentioned close into, through, over, and along the said close, in which, &c., called The Yard, unto and into the said public king's highway to go, return, pass, and repass on foot in and along the said last-mentioned way at seasonable hours in the day time.

The plaintiff replied, that the said John Waterfield so being owner of the said close, in which, &c., did not grant to the said Thomas Blanks and Mary his wife, in right of the said Mary, being the owners of the said messuage and yard, now of defendant, a certain way to pass on foot from the said public highway or street called the Petty Cury, into, through, over, and along the said close called The Yard, in which, etc.

Upon this replication issue was taken, and there was also a new assignment, upon which judgment was suffered by *nil dicit*. At the trial before *Gazelee*, J., at the last Cambridge Assizes, it appeared that the premises occupied by the plaintiff and defendant adjoined each other, and were formerly in the hands of a single owner, who divided them in the year 1734, by a conveyance of part to a person under whom the defendant claimed, but the right of way now asserted was not reserved in that conveyance. As to the undisputed use of the way, there was conflicting testimony; but the weight of evidence showed that the alleged right had been pretty constantly contested, and the defendant upon recently taking some adjacent premises, the approach to which was by the entrance he claimed into the yard, said, "My right of way from the street to the yard can *now* no longer be resisted."

Castelli, J., referred to *Doe d. Fenwick* v. *Read*, 5 B. & A. 232, and told the jury that if upon this issue they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that that deed had been lost, they would find a verdict for the defendant; if they thought there had been no way granted by the deed, they would find for the plaintiff.

The jury said they could not find any deed, and gave a verdict for the plaintiff.

Tuddy, Serjt., obtained a rule *nisi* for a new trial upon an objection to this direction, against which rule *Wilde*, Serjt., was to have shown cause; but the court stopped him, and called on *Tuddy* to support his rule.

Best, C. J. I think that the direction of the learned judge was perfectly right, and that he went far enough. I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a judge would not be justified in saying that they must, but that they may, presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to con-

sider them, and to decide accordingly. In the present case the way which was pleaded had not been reserved by the deed under which the premises to which it was said to belong were separated from the plaintiff's premises; the user, so far from having been uninterrupted, had almost always been the subject of contest; and the expression employed by the defendant upon acquiring a way to the premises recently taken, showed that he was distrustful of his claim before.

PARK, J. Nothing but uninterrupted usage can raise a presumption of a grant; here the usage was always interrupted, and the learned judge's charge was perfectly correct.

BURROUGH, J. The charge to the jury was so proper that I shall adopt it for the future. It was of the essence of the plea and replication that the jury should inquire whether or not the deed stated in the plea ever had existence. If there had been such a deed, it is not probable the usage of the way would have been constantly disputed, as it appears to have been, according to the evidence at the trial. There is no ground for wishing to alter the verdict of the jury, and the defendant's rule must be

Discharged.

SOLOMON *v.* VINTNERS' COMPANY.

EXCHEQUER. 1859.

[*Reported* 4 *H. & N.* 585.]

POLLOCK, C. B.[1] I have to deliver the judgment of myself, my Brother MARTIN, and my Brother CHANNELL; my Brother BRAMWELL does not differ in the result, but I believe he will express his own views. He agrees with the judgment of the court, but does not adopt all the reasons upon which our judgment proceeds.

The plaintiff complained of an injury occasioned to his dwelling-house by the taking down and removal of two houses, the defendants' property, under the circumstances after mentioned. The facts proved were these: The plaintiff was the owner of a house in Pilgrim Street in the city of London. His house was built on a hill having a descent towards the west. There was a house next below his and adjoining to the plaintiff's house belonging to a third person, and the defendants were the owners of the two houses next adjoining. One of the defendants' houses was a corner house of the street. For upwards of thirty years the four houses were all of them out of the perpendicular, leaning to the west, and this might have been seen by any one passing by. There was no evidence how or when this occurred, or when the houses were built, or that there was any connection between the houses either in title, occupation, possession, or otherwise. In 1857 the lease of the defendants' houses expired, and they entered into a contract with a person of the

[1] The opinions only are given.

name of Robins, that he should pull them down and erect two other houses in their place, and that, upon this being done, they would grant him a lease at an agreed rent. Robins proceeded to pull down the houses, and in consequence damage was caused to the plaintiff's house. And the question is, whether these facts show any liability on the part of the defendants. For the purpose of the argument, it is to be assumed that Robins acted with negligence. The defendants contended that the facts before stated afforded no evidence that the plaintiff had acquired, or had, as alleged by his declaration, a right to have his house in any way supported by the house of the defendants; and that they were not liable for the negligence of Robins, their contractor, in taking them down under the contract referred to. The plaintiff, on the other hand, contended that upon the facts proved he had acquired a right to the support of the defendants' houses, and that if the defendants, by themselves or their servants, had taken the houses down and deprived the plaintiff of the support, the very act of removing the support to which he was entitled, however carefully done, would entitle him to maintain an action against the defendants; and that the taking down being an act done by Robins by their authority and direction, was the same as if it had been done by themselves. It was admitted by the learned counsel for the plaintiff that, on the existing authorities, the defendants would not be responsible for the mere negligence of Robins. My Brother *Martin* at the trial was of opinion that the defendants were not liable, and directed a nonsuit, with leave to the plaintiff to move to enter the verdict for him, in which event it was agreed that all further questions should be referred to an arbitrator. A rule was accordingly obtained, which came on for argument in the course of last term.

It seems now to be well settled that the right of one man's land to support from the adjoining land is not an easement or in the nature of an easement at all, but a natural right, like the right to the flow of the water in a natural river: *Rochotham* v. *Wilson*, 8 E. & B. 123. But the right to support for one building from an adjoining building is certainly not a natural right. It may arise in different ways. In *Partridge* v. *Scott*, 3 M. & W. 220, Alderson, B., in delivering the judgment of the court with regard to a right very analogous, says, that "rights of this sort, if they can be established at all, must have their origin in grant." In *Peyton* v. *The Mayor of London*, 9 B. & C. 736, Lord Tenterden intimated that if it appeared that both houses were originally built by the same owner, the right to support might exist. In *Richards* v. *Rose*, 9 Exch. 218, this court held that, in the latter case, such a right or easement did exist, and the right was thus recognized by the civil law.

If the house removed had been the next adjoining the plaintiff's, we should have felt much embarrassed by some cases and *dicta*. In *Stansell* v. *Jollard*, Selwyn's Nisi Prius, 435, and *Hide* v. *Thornborough*, 2 Car. & K. 250, such a right of support is stated to be gained if the houses have stood for twenty years; and in *Humphries* v. *Brogden*,

12 Q. B. 719, Lord Campbell refers to these cases. It is extremely difficult to see how the circumstance of the houses having stood for twenty years makes any difference, or creates a right where houses are supposed to have been built by different adjoining landowners, each with its own separate and independent walls, but upwards of twenty years ago one of them got out of the perpendicular, and leaned upon and was supported in part by the others, so that if the latter were removed the other would fall: it cannot be a right by prescription, which supposes a state of things existing before the time of legal memory.

Nor does it seem to us to be a right under the Prescription Act, 2 & 3 Wm. 4, *c.* 71, which has been hitherto confined to rights in their nature of a perpetual and permanent character, and the ownership of which is in fee simple.

It seems to us that, in the absence of all evidence as to origin or grant, the only way in which such a right can be supported is that suggested by Lord Campbell in *Humphries* v. *Brogden*, namely, an absolute rule of law similar to that which is stated to have existed in the civil law. But there is no authority for any such rule to be found, at least none was stated to us. Lord Campbell compares it to a right to light. But that right is created by the express enactment of the 3d section of the Statute before referred to. And it seems contrary to justice and reason that a man, by building a weak house adjoining to the house of his neighbor, can, if the weak house gets out of the perpendicular and leans upon the adjoining house, thereby compel his neighbor either to pull down his own house within twenty years, or to bring some action at law, the precise nature of which is not very clear; otherwise, it is said, an adverse right would be acquired against him.

But these questions we refer to because they were matters of argument at the bar. It is not necessary to decide them in the present case. The defendants' houses were not next adjoining the plaintiff's; there was an intermediate one, and it is necessary to consider whether any of the grounds suggested as creating a right are supported by the evidence. As to any right arising from the non-removal of the defendants' houses (assuming it to be that a man who has a house suitable for his own purposes must pull it down within twenty years, otherwise his neighbor, whose house may lean upon it, would gain an adverse right of support), the evidence is defective, for it is plain that, during much the greater part of the thirty years during which the houses were out of the perpendicular, the defendants' houses were in the possession of tenants under leases. The defendants could not have pulled them down if they had been disposed to do so.

But it was strongly argued that the defendants might have maintained an action against the plaintiff during the first twenty years of the leaning of his house. When a house built upon the edge of a man's land gets out of the perpendicular, and leans or hangs over his neighbor's land, it no doubt occupies a space belonging to his neighbor, the rule of law being, *Cujus est solum, ejus est usque ad cœlum*. But, assuming the

neighbor could maintain an action to recover the space, or for interfering with it, the defendants could not have maintained an action for the plaintiff's use of the projection over the soil of the intervening owner. It was said, however, that prior to the 1st of June, 1833, now twenty-four years ago, a writ of *quod permittat* might have been brought; but even if this were so, it would be of no avail, for during fourteen of the twenty years this action has been abolished. It was said that since then an action on the case might have been brought. But we apprehend that, upon the evidence in this case, the defendants could have maintained no such action. There was no evidence how the leaning originated. It may have been that the defendants' houses were the first to give way, and that this was caused by some excavation in the street for which they were in no wise responsible, and that the getting out of the perpendicular of the plaintiff's house originated from the same cause. Under such circumstances we think the defendants could not have maintained an action on the case against the plaintiff. If the only evidence had been that in this case, we entertain no doubt the judge would have been bound to have held that there was no evidence to go to the jury.

The question therefore really comes to this. Is there any authority in the law for the existence of such a right as that claimed by the plaintiff? We find none where the houses do not adjoin, and although we possibly might have acted upon the cases before referred to, if the circumstances had been the same, we are not disposed to extend the principle further than we feel ourselves compelled by authority. If there be such a rule of law as that suggested by Lord Campbell in *Humphries* v. *Brogden*, the plaintiff's contention may be right. But, as already observed, we have not been referred to, and are not aware of any authority to this effect. The rule, therefore, to set aside the nonsuit will be discharged.

BRAMWELL, B. I think that the rule ought to be discharged, and I do not dissent from any reason given by My Lord for discharging the rule. But the reasons there given seem to me to involve questions of very great difficulty and importance, and I would rather not pronounce an opinion on them without a great deal more consideration than I have been able to give them. I certainly would not do it in any case without some necessity for so doing, which I do not see here, because there is ground upon which the defendants are entitled to our judgment; and it is this. Where a house leans as this does, the owner of it may make two claims in respect of it upon his neighbor, one a general right to impend over and occupy a portion of his ground, as it were, and to hang over and occupy a portion of air or the space over it; the other right, a right to support from the walls of the house of his neighbor. Now the former claim is here out of the question, because the plaintiff's house did not impend over the defendants' land; therefore the question is limited to the latter; and accordingly Mr. Blackburn's contention was, that the plaintiff had a right to have his house supported by the

intermediate house which the plaintiff said leaned upon the defendants' house. The right so claimed, as I understand it, was this; viz., a right to have the support while the defendants' house stood there, — to have the defendants' house continue to stand there to give that support, — and, when the defendants' house would no longer stand of itself, a right on the part of the plaintiff to go in and repair it, and make it sufficient to bear the weight of the plaintiff's house. Now that is a claim which to my mind is extravagant upon the very enunciation of it; but for aught I know it is one which may exist in point of law. Supposing it does exist, it must be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi*, *precario*, nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other; but it will be only a conjecture. No one can say but that both may have slipped and both stand. I think the expression is, "upon the square," self-supporting. But it may turn out to be the fact, that the house which leans towards the other, affords as much support to that other by their mutual cohesion as the other affords to it. In fact it is impossible to say which house is being supported. It is true that in this case when the defendants' house was removed, the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If any one had done so, it would have been but a matter of conjecture. Therefore, supposing that the plaintiff, for more than twenty years, had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right. It appears to me, therefore, that on that ground there has been nowhere that which is called adverse enjoyment or enjoyment as of right, of that which Mr. Blackburn claimed for his client; consequently that no title was gained under any of the different ways in which it has been surmised it might have been gained. It seems to me on that ground (of course I bear in mind that there is an intermediate house) that the defendants are entitled to our judgment.

MARTIN, B. If I had been one of the jury, I should certainly have found a verdict for the defendants on the ground stated by my Brother Bramwell. But it strikes me that, in that view of the case, it was a question for the jury, and not one of law.

Hawkins and *Keane* (with whom was *Edwin James*), for the defendant.

Blackburn and *Honyman*, for the plaintiff.

Rule discharged.

WEBB *v.* BIRD.

EXCHEQUER CHAMBER. 1863.

[*Reported* 13 *C. B. N. S.* 841.]

WIGHTMAN, J.[1] We took time for the consideration of this case on account of its novel character. It appears by the finding of the arbitrator to whom the case was referred by order of Nisi Prius, that the plaintiff was the owner and occupier of a windmill built in 1829; that, from the time of its being built, down to 1860, the occupier had enjoyed as of right and without interruption the use and benefit of a free current of air from the west for the working of the mill; that, in the last-mentioned year, 1860, the defendants erected a school-house within twenty-five yards of the mill, and thereby obstructed the current of air which would have come to it from the west, whereby the working of the mill was hindered, and the mill became injured and deteriorated in value. Two cases were cited and mainly relied on for the plaintiff, — one in the 2 Rolle's Abridgment, p. 704, and the other in 16 Viner's Abridgment, tit. *Nusance* (G), pl. 19; but both are shortly stated, and amount to little more than *dicta;* and it does not appear that they are anywhere else reported, or in what manner or the terms in which such a right was claimed, whether by prescription or otherwise. There is a third case, called *Trahern's Case*, Godbolt, 233, which was the case of a nuisance caused by building a house so near as to hinder the working of the plaintiff's mill; and the judgment of the court appears in the first instance to have been like that of the case in Rolle's Abridgment, that so much of the house should be thrown down as hindered the working of the mill. But, the plaintiff contending that the whole house should be thrown down, the case was adjourned, and no ultimate decision appears to have been given. These are all the authorities which we have been able to find upon the subject.

We agree with the opinion of the Court of Common Pleas that the right to the passage of air is not a right to an easement within the meaning of the 2 & 3 W. 4, *c.* 71, § 2.

The mill was built in 1829, and so the claim cannot be by prescription.

The distinction between easements, properly so called, and the right to light and air, has been pointed out by Littledale, J., in *Moore* v. *Rawson*, 3 B. & C. 332, 340; 5 D. & R. 234.

It remains, therefore, to be considered, whether, independently of the Statute, the right claimed may be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a

[1] The case was argued before WIGHTMAN, J., BRAMWELL, B., CHANNELL, B., [illegible], J., and WILLES, B. The opinion only is given.

certain term of years. We think, in accordance with the judgment of the Court of Common Pleas, and the judgment of the House of Lords in *Chasemore* v. *Richards*, 7 House of Lords Cases, 349, that the presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant. As was observed by Lord Wensleydale, it was going very far to say that a man must go to the expense of putting up a screen to window-lights, to prevent a right being gained by twenty years' enjoyment. But, in that case, the right claimed, which was the percolating of water underground, went far beyond the case of a window. In the present case, it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it.

We are therefore of opinion that the judgment of the court below should be affirmed.

BLACKBURN, J. I perfectly concur in the judgment, but wish, for myself, to guard against its being supposed that anything in the judgment affects the common-law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my Brother Willes, in the court below, that the case of the right to light, before the Statute, stood on a peculiar ground.

Judgment affirmed.

David Keane (with whom was *Bulwer*), for the plaintiff.

Couch (with whom was *O'Malley*, Q. C.), *contra*, was not called on.

ANGUS *v.* DALTON.[1]

QUEEN'S BENCH DIVISION. COURT OF APPEAL. HOUSE OF LORDS. 1877, 1878, 1881.

[*Reported* 3 *Q. B. D.* 85; 4 *Q. B. D.* 162; 6 *App. Cas.* 740.]

CLAIM by Angus & Company, coach-builders, against Dalton and the Commissioners of Her Majesty's Works and Public Buildings, for injury to the plaintiffs' factory at Newcastle-upon-Tyne.

[1] This action was tried in 1876 before *Lush*, J., who directed a verdict for the plaintiffs. The Queen's Bench Division (*Cockburn*, C. J., and *Mellor*, J.; *Lush*, J., *dissentiente*) in 1877 ordered judgment to be entered for the defendants. The Court of Appeal (*Cotton* and *Thesiger*, L. JJ.; *Brett*, L. J., *dissentiente*) in 1878 reversed this judg

At the trial, before *Lush*, J., in 1876, the judge directed a verdict for the plaintiffs for the amount claimed, subject to a reference to ascertain the damages, and extended the time to enable the plaintiffs to move for judgment. In April, 1877, the plaintiffs moved accordingly.

[1] The plaintiffs are owners in fee of a coach factory at Newcastle-upon-Tyne. The defendant Dalton is a builder, who had been employed by the Commissioners of Works and Buildings, under a contract to take down a house adjoining to the plaintiffs' factory, and to erect in its stead a building to be used as a Probate office.

The action is brought for excavating the soil of the adjoining property, on which the Probate office was to be built, to such a depth as left the foundation of that part of the coach factory without sufficient lateral support, and thereby causing the factory to fall.

The two houses were apparently built at the same time, and were estimated to be upwards of a hundred years old. They were divided by a wall which belonged to the house pulled down, and which wall had been taken down by the defendants without injury to the factory.

Up to the year 1849, being about twenty-seven years before the accident, both houses had been occupied as dwelling-houses; but in that year the plaintiffs' predecessor converted his house into a coach factory, and to adapt it to this purpose he removed the internal walls, and erected on his own soil close to and in contact with so much of the dividing wall, a large stack of brickwork serving the twofold purpose of a chimney stack, and also of a support to the main girders which had to be put in to sustain the floors. These girders were inserted into the stack on the one side, and into the plaintiffs' wall on the opposite side, and were strongly secured with braces and struts, and they thus formed the main support of the upper stories of the factory. When the defendants removed the dividing wall they left this stack untouched, and erected on the site of the dividing wall a temporary wooden gable so as to protect the factory while the new building was in progress. There had been no cellarage in the adjoining house, and it was not disputed

ment. The case was argued in the House of Lords in 1879, and again in presence of seven of the judges in 1880. Four of the judges, *Pollock*, B., *Field*, *Manisty*, and *Fry*, JJ., were of opinion that the judgment of the Court of Appeal should be affirmed, and three, *Lindley*, *Lopes*, and *Bowen*, JJ., were of opinion that it should be reversed. The law lords, *Lord Selborne*, L. C., *Lord Penzance*, *Lord Blackburn*, *Lord Watson*, and *Lord Coleridge*, C. J., were all of opinion that the judgment of the Court of Appeal should be affirmed. Of the eighteen judges who heard the case, twelve, therefore, were one way, and six the other. But the reasons of the majority were very different, and so were those of the minority. All the judges and law lords — except *Lord Coleridge* and *Mellor* and *Lopes*, JJ., who contented themselves with expressing their agreement with some one or more of the opinions that were read — gave judgments of their own, most of them very elaborate. The case is too long to print at length, — it fills one hundred and eighty-two pages of the Law Reports, — but it is too important to omit.

A synopsis, therefore, is given of the opinions, and the more important passages are quoted at length.

[1] In no one of the reports are either the facts or the arguments given. The statement of facts here printed is taken from the opinion of *Lush*, J., 3 Q. B. D. 85, 87.

that if none had been made, the stack and the factory would not have been affected by the alterations.

The defendants, however, having removed the dividing wall and erected the temporary gable, proceeded to dig to the depth of several feet below the level of the foundation of the plaintiffs' stack, leaving a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall. This pillar, however, large as it was, proved to be insufficient. After exposure to the air, and before the foundations of the new wall had been completed, it gave way, and the stack sunk and fell, drawing after it the entire factory.

Under these circumstances, it was contended, on behalf of the defendants, first, that the plaintiffs' factory was not entitled to the support of the adjacent soil; and, secondly, that at all events the Commissioners of Works and Buildings were not responsible for the negligence of the contractor in not leaving sufficient support or not properly shoring up the chimney stack.

These points were reserved at the trial, which took place before *Lush*, J., at Newcastle at the Summer Assizes, 1876, and a verdict was entered for the plaintiffs, subject to the questions of law and to a reference to an arbitrator to assess the damages, in case the verdict should stand against both or either of the defendants.

Littler, Q. C., *G. Bruce*, and *Ridley*, for the plaintiffs.

Sir J. Fitzjames Stephen, Q. C., and *Shield*, for the Commissioners.

Herschell, Q. C., and *Wheeler*, for Dalton.

[Lush, J., was of opinion that the building "had acquired the status of an ancient building" (page 100), and that the plaintiffs were entitled to hold their verdict. In the course of his opinion he said: —]

I conclude, therefore, that the mere absence of assent, or even the express dissent, of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, and that nothing short of an agreement, either express, or to be implied from payment or other acknowledgment, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption. In other words, that it would be presumed after the lapse of twenty years that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance [page 93] . . .

The law of lights having been settled by the Prescription Act, any argument drawn from the Limitation Act applies only to such an easement as the one in question, which was left untouched by the Prescription Act. It seems to me to be the necessary consequence of the Limitation Act, that such an easement should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence, — that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for

twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded, in view of the necessary effect of the Limitation Act upon such an easement as this.

It is not, however, necessary in this case to base my judgment on this ground. If the right to support still rests on the doctrine of presumption, no facts are shown which in my opinion are admissible to rebut it, for nothing is shown except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory; and this, for the reasons already given, cannot, in my opinion, be held to constitute rebutting evidence. If notice to the adjoining owner that an additional burden has been cast upon his land be an ingredient, that is disposed of by the fact that the conversion of the dwelling house into a factory, and the use of the premises as a factory during twenty-seven years, were things open and notorious.

There are here, then, all the elements which go to make up the ordinary presumption, unmixed with any rebutting element. If such a length of enjoyment under such circumstances does not create a right to support from the adjacent soil, then no building the date of whose origin can be proved can claim it. For the common law does not present any alternative to the time of legal memory, except twenty years' enjoyment. This would be an alarming doctrine, especially at the present day, when a very small proportion of the owners of houses now standing could rest their title to support upon immemorial enjoyment [pages 94, 95].

[COCKBURN, C. J., was of opinion that the defendants had acquired no easement of support; he said: —]

That the right to the lateral support of the adjacent soil for a building which has been superadded to the soil is an easement, as distinguished from the proprietary right to such support for the soil itself in its natural condition, is undoubted. Equally certain is it that, except where the positive law steps in, and, in the absence of any legal origin, gives to a fixed period of possession or enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant. Upon both these points the authorities are uniform and positive. It is no doubt equally true that, in the absence of proof of any grant, the existence of a lost grant may be presumed from length of enjoyment. And in no system of jurisprudence has this doctrine been carried to greater lengths than in our own. In the absence of any sufficient law regulating the period of prescription, judges, to make up for this deficiency, were in the habit of directing juries to presume grants, in the past or possible existence of which no one believed, — a practice to be deprecated, and, in spite of precedent, to be followed with great reserve, and certainly with no disposition to extend it.

Looking to the importance of the question here involved, and to the fact that the law as to lateral support, not having hitherto been brought before a court in banc, has not been made the subject of authoritative decision, it may be useful to trace the growth of this doctrine as to presumption and the extent to which it has been carried, and for this purpose to review the authorities on the law of prescriptive easements.

At the common law there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, "the memory of man ran not to the contrary." But by several Statutes, fixed periods were limited for the bringing of actions for the recovery of real estate. Prior to the Statute of Merton, Bracton tells us that the limitation in a writ of right was from the time of Henry I., that is to say, from the year 1100, or 135 years. L. 2, f. 179.

By the Statute of Merton (20 Hen. 3, *c.* 8) the limitation in a writ of right was from the time of Henry II., — a period of seventy years. Writs of *mort d'ancestor*, and of entry, were not to pass the last return of King John from Ireland, — a period of twenty-five years. Writs of novel disseisin were not to pass the first voyage of the king into Gascony, — a period of fifteen years.

New periods of limitation were fixed by the Statute of Westminster, 3 Edw. 1, *c.* 39 (1275). By this Statute the time for bringing a writ of right was limited to the time of King Richard I., — a period of eighty-eight years. Writs of *mort d'ancestor*, of cosinage, of aiel, and of entry, were limited to the coronation of Henry III., — about fifty-eight years. The writ of novel disseisin was to remain limited as before, namely, to the passage of Henry III. into Gascony.

It is plain that this Statute had reference to actions for the recovery of real estate. Nevertheless the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule as to prescription established by the Statute to incorporeal hereditaments, and, among others, to easements.

As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But, here again, the legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory; that is to say, from the time of Richard I. This convenient rule having been established, the judges seem not to have thought it worth while, when the Statute of 31 Hen. 8, *c.* 2, was passed, by which in a writ of right the time was limited to sixty years, to apply, by an analogous use of that Statute, the time of prescription established by it to actions involving rights to incorporeal hereditaments.

In a case of *Bury* v. *Pope*, Cro. Eliz. 118, in an action for stopping lights, according to the report, "It was agreed by all the justices that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and the house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other things against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land; and it was adjudged accordingly."

And as late as 1 Car. 2, it was held in a case of *Sury* v. *Piggott*, Poph. 166, that to maintain an action for obstructing lights, the light must be prescribed for as having been enjoyed time out of mind.

But the Statute of Jac. 1, *c.* 21, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change in the law by the arbitrary adoption of that period by the courts as sufficient to found the presumption of the existence of a right from the time of legal memory. Here, again, the boldness of judicial decision stepped in to make up for defects in the law which the supineness of the legislature left uncared for. But it is to be observed, and the observation is specially important to the present purpose, that with all their desire to reduce the period of prescription within reasonable limits, the courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory. Hence, if in the course of a cause it appeared that the disputed right had had a later origin, the presumption failed, and the claim of right was defeated.

The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming after long user a grant by a deed which in the lapse of time had been lost. At first, to raise this presumption it was required that the user should be carried back as far as living memory would go; but after the Statute of James, user for twenty years was — here again, without any warrant of legislative authority, and by the arbitrary ruling of the judges — held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. Well might Sir W. D. Evans, while admitting the utility of this doctrine, say that its introduction was "a perversion of legal principles and an unwarrantable assumption of authority." 2 Ev. Poth. 139.

Thus the law remained till the Act of 2 & 3 Wm. 4, *c.* 71, was passed, with the view of putting an end to the scandal on the administration of justice which arose from thus forcing the consciences of juries. How far it has effected this purpose will be seen further on.

But this doctrine of presumption from user or enjoyment under the former law could not, according to the highest authorities, be carried, as regarded the presumption of a lost grant, any more than that which had reference to the existence of an easement beyond time of legal memory, further than that of a presumption capable of being rebutted, and so destroyed [pages 102–106] . . .

I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances there is no form of easement in which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support. For this easement is obviously one of a very anomalous character. In every other form of easement the party whose right as owner is prejudicially affected by the user has the means of resisting it if illegally exercised. In the case of the so-called "affirmative" easements he can bring his action, or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach the more nearly to this, — that of light, — the supposed analogy entirely fails. For although no action can be brought against a neighboring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question the adjoining owner has no remedy or means of resistance, — unless, indeed, he should excavate in his own immediately adjacent soil while the neighboring house is being built or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house. Is he to endanger and perhaps destroy his own house by excavating under it for the purpose of preventing his neighbor from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity

of the owner's soil a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right.

For these reasons I cannot entertain a doubt that — at all events as the law stood before the passing of the Prescription Act, 2 & 3 Wm. 4, c. 71 — the presumption of a grant, if any, arising in this case from the support to the plaintiffs' premises having been had for the twenty-seven years, was open to be rebutted; and that when it was proved — or, what is the same thing, admitted — that when the plaintiffs' premises were rebuilt — the original easement, if any, being, as I have already pointed out, gone — the assent of the defendants' predecessors was not asked for or obtained by grant, or in any other way, to any support being derived from their soil, the presumption was at an end [pages 116–118].

[MELLOR, J., admitted "that the case is not free from great difficulties (page 130)," but entirely agreed with the Chief Justice.]

The defendants had judgment.

An appeal was taken to the Court of Appeal (4 Q. B. D. 162), and argued in May, 1878, before BRETT, COTTON, and THESIGER, L. JJ., by *Littler*, Q. C., *G. Bruce*, and *Ridley*, for the plaintiffs.

Sir James Stephen, Q. C., and *A. E. Gathorne-Hardy*, for the Commissioners.

Herschell, Q. C., and *Wheeler*, for Dalton.

THESIGER, L. J. [after pointing out that the right to lateral support of buildings from soil occupied an intermediate place between the right to the support of soil from soil and the right to the support of building from building, and that it was not a right of property, continued thus: —]

If, then, the right claimed be not a right of property, is it an easement which can be acquired; and if it can, how and under what circumstances may it be acquired? That it is a right or easement, which may under some circumstances be acquired, is treated as clear law by a long series of authorities, and is admitted by all the judgments in the court below; that it is an easement not coming within the Prescription Act appears also to be generally admitted, and is assumed by me; that it is a right or easement, which must be founded upon "prescription or grant express or implied," is a proposition stated in terms already quoted in the judgment of the Court of Exchequer Chamber in *Bonomi* v. *Backhouse*, E. B. & E. 646, at page 655; and borne out by the general current of authority upon the subject of the acquisition of easements. I cannot therefore accede to the view suggested

by Lush, J., in the court below, that an absolute right to an easement uninterruptedly enjoyed for twenty years may be obtained by analogy to the period of limitation fixed as regards entry on lands by 21 Jac. 1, *c.* 16. It may be that the commencement of the reign of Richard I. was originally fixed as the period of prescription for incorporeal rights by analogy to the Statute 3 Edw. 1, *c.* 39, which fixed the same period for alleging seisin in a real action, and there are *dicta* to be found in the books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But as a matter of practical law, this analogy does not appear to have been extended by the courts to these last-mentioned Statutes. The reign of Richard I. still remained the time to which legal memory in regard to easements was supposed to relate, and although the later Statute of 21 Jac. 1, *c.* 16, did undoubtedly suggest to the minds of the judges the propriety of giving to twenty years' uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the Statute by analogy, notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the Statute of Edward I. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, although I must add that it has had in my opinion in many respects a beneficial operation, and is after all but an extension of the fiction which had previously formed the basis of prescriptive titles; for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent which has been sanctioned by established authority. It becomes necessary, therefore, in the first place, to consider the character and extent of the presumption of a lost grant as applicable to easements generally, and then, in the second place, to see in what respects, if any, a difference exists in regard to the particular easement claimed in this action.

And first, as regards easements generally, the authorities cited in the court below establish that this presumption is not a *presumptio juris et de jure*, or, to use other language, is not an absolute and conclusive bar. On the other hand, these same authorities lay down that the uninterrupted enjoyment of an easement for twenty years raises, to use the words of Lord Mansfield, in *Darwin* v. *Upton*, 2 Wms.'s Notes to Saund. 506, "such decisive presumption of a right

by grant or otherwise, that unless contradicted or explained, the jury ought to believe it;" and the corollary upon this proposition is stated by Bayley, J., in *Cross* v. *Lewis*, 2 B. & C. 686, where he says: "I do not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin* v. *Upton* it has been held that in the absence of any evidence to rebut the presumption, a jury should be told to act upon it." What, then, is the nature of the evidence which would be held to "contradict," "explain," or "rebut" this decisive presumption? Proof of the mere origin of the easement within the period of legal memory is not sufficient for this purpose; it was to meet the hardship which arose from such proof preventing the acquisition of a prescriptive title that the legal fiction of a grant made and lost in modern times was invented; neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment. See *Cross* v. *Lewis*, 2 B. & C. 686, at page 689, where Bayley, J., speaking of the case of opening windows, says: "If his neighbor objects to them, he may put up an obstruction; but that is his only remedy, and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them." Again, proof that the dominant and servient tenement were originally in one ownership, and were separated under such circumstances as to negative the presumption of any reservation or grant of the easement claimed having actually been made at the time of the separation, would not be sufficient to prevent the presumption arising in a case where the enjoyment has been uninterrupted for twenty years; see *Livett* v. *Wilson*, 3 Bing. 115, where, although it was proved that the two tenements were separated by a deed containing no grant or reservation of the easement claimed, the court did not rely upon this fact as supporting the verdict of the jury negativing the presumption of a lost deed, but took as their ground the contested character of the user. In harmony, as it appears to me, with the last proposition, is the further proposition that the presumption cannot be rebutted by mere proof by the owner of the servient tenement that no grant was in fact made either at the commencement or during the continuance of the enjoyment. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to suppose that among the numerous cases in which easements have been held by the courts to have been acquired by uninterrupted user for twenty years only, there must not have been many in which the owner of the servient tenement at the time when the period commenced was alive when the action was tried to contradict, if such evidence had been admissible, the fact of a grant; and if such evidence were admissible, it is almost inconceivable that in the numerous cases in which questions of easements have been discussed,

no trace of an opinion to that effect should be found in the observations of the judges. The correct view upon this point I take to be, that the presumption of acquiescence and the fiction of an agreement or grant deduced therefrom in a case where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct. If, instead of its being a mere legal inference, the courts had considered that it was an inference of fact to be drawn by juries like other inferences of fact, and in respect of which the servient owner might be called as a witness to negative the fact by denial of a grant ever having been made, it is difficult to understand how judges could have systematically, as the Lord Chief Justice admits they did, directed juries to find grants "in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction." 3 Q. B. D. 105. The case of *Campbell* v. *Wilson*, 3 East, 294, lends support to my view upon this point, and illustrates to some extent my meaning when I speak of explanation of the conduct, which is relied upon as leading to the presumption of a grant. There, under an award made twenty-seven years before action, all rights of way in a particular locality, except those set out in the award, of which the way in dispute in the action was not one, had been extinguished. The facts of the case pointed so strongly to the use of the way in question having originated in a mistaken acting under the award, that the judge in his summing up almost assumed the fact; but, having ruled also that notwithstanding it, the proof of subsequent user as of right was sufficient to raise the presumption of a grant, and the jury having found in favor of the defendant, who claimed the way, the court supported both the ruling and the finding; and Le Blanc, J., said: "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favor, or otherwise than under a claim or assertion of right, and indeed, unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant." The direction of the Lord Chief Justice himself to the jury in the case of *Rogers* v. *Taylor*, 2 H. & N. 828, to which I shall have to refer again, still further supports my view. But while the cases which I have cited throw light upon the point as to what circumstances will not negative the presumption of a grant arising from uninterrupted enjoyment for twenty years, still further light is thrown upon the subject by a consideration of cases cited in the court below, in which the presumption was held to have been properly rebutted. The case of *Barker* v. *Richardson*, 4 B. & A. 579, was one in which the owner of the servient tenement, a rector, tenant for life, was incompetent to make a grant, and it was held, therefore, that a

grant by him could not be presumed. In *Webb* v. *Bird*, 13 C. B. N. S. 841, which was the case of a claim, as stated in the declaration, to the enjoyment as of right of the "benefit and advantage of the streams and currents of air and wind which had used to pass, run, and flow from the west unto a windmill," and which enjoyment was alleged to have been interrupted by the building of a school-house twenty-five yards to the west of the windmill, Wightman, J., in delivering the judgment of the Court of Exchequer Chamber, said as follows: "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it" (page 845). Again, in *Chasemore* v. *Richards*, 7 H. L. C. 349, a claim was made to underground water, which merely percolated through the strata in no known channels, and it was held by the House of Lords that the claim could not be supported as a right of property, and that looking to the casual and uncertain, as well as secret character of the enjoyment of such water, no grant of an easement could be presumed.

These cases, therefore, as direct authorities, go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant: and on the other hand, indirectly they tend to support the view that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shown in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, *Qui non prohibet quod prohibere potest assentire videtur*.

This maxim brings me, secondly, to the consideration whether the easement of lateral support for buildings from adjoining soil differs, and if so in what respects, from easements generally, and whether different principles or presumptions of law are to be applied to it. It is said by the Lord Chief Justice that this particular easement is one, the enjoyment of which it is practically impossible to resist. If that be so, then the maxim I have just quoted does not apply, and the proper inference would be that the easement comes within the authority of the cases of *Webb* v. *Bird* and *Chasemore* v. *Richards*, and cannot by any period of user, however long, be acquired: but the Lord Chief Justice does not go so far as this: his language upon the point is as follows: "I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the

presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which at the present time a grant would properly be implied. Thus, they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or when from other circumstances a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed." 3 Q. B. D. 116. The Lord Chief Justice appears, therefore, to place the easement of lateral support for buildings in some special class of its own, and while admitting that the doctrine of a lost grant may be under certain circumstances applicable to it, to make its application subject to conditions and limitations other than those which apply to easements generally. Is, then, the nature of the easement so anomalous as to justify this treatment of it? and even if in its nature it does present anomalous features, are they such as have at any time been considered by the courts to warrant distinctive treatment?

Upon the first of these two questions it may not unreasonably be urged that the physical impossibility of resistance to the enjoyment of the easement, if it exists at all, exists only in cases where, while the servient tenement has to bear the burden of the easement, it at the same time as a dominant tenement enjoys a corresponding benefit; that the tenement from which support is claimed, must at the commencement of the period of enjoyment be land either in its natural state or built upon; if the former, that there is little if any more difficulty in physically resisting the enjoyment of the easement than there would be in obstructing the access of light to windows; if on the other hand the servient tenement be land built upon, that then the easement which the dominant tenement will obtain will be no other in kind than that which the servient tenement must either have already acquired or be in the course of acquiring. Notwithstanding this reasoning, I am not inclined to dispute that the easement of support for buildings from adjoining soil does possess physical features, which distinguish it materially from most other easements, except perhaps that of the access of light to ancient windows, to which it has a strong analogy: and, if the principles of law relating to easements were now to be settled for the first time, I might be disposed to limit this particular easement of support, and I may add that of light also, by conditions other than those which are applicable to affirmative easements. But the principles of law relating to easements are in the main settled, and the easement most analogous to the one in question here, namely,

that of light, is found to be at common law placed as high as, and by the Prescription Act placed even higher than, affirmative easements, although one, the obstruction of which in many cases must be of the greatest practical difficulty. Can it properly be said, then, that the difficulty or practical impossibility of obstruction in the case of the easement of support for a building by soil is such as to place it at common law in an entirely different category from other easements, and to render it subject to any real legal distinctions? I think not. This very ground of difficulty and practical impossibility of obstruction was present to the minds of the judges, who took part in the judgment in the Court of Exchequer Chamber in *Webb* v. *Bird*, 13 C. B. N. S. 841, and whilst they decided against the easement claimed in that case on that ground, Blackburn, J., was careful to guard against the supposition that the reasoning of the judgment extended to the easement of lateral support for buildings. His words were as follows: "I perfectly concur in the judgment, but wish for myself to guard against its being supposed that anything in the judgment affects the common-law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my Brother Willes, in the court below, that the case of the right to light, before the Statute, stood on a peculiar ground" (page 844). But the question can only be fully answered by tracing down in a little more detail the authorities upon the subject. In *Palmer* v. *Fleshees*, Sid. 167, which was a case of lights, the resolution of the judges put the right of support for an ancient house upon the same footing as the right to ancient lights. The fact alleged by the Lord Chief Justice (3 Q. B. D. 114), that the case does not say what length of time will constitute a house or lights "ancient," and does not touch the subject of presumption, does not affect the value of the case upon the point for which I cite it. Again, in *Stansell* v. *Jollard*, 1 Selw. N. P. 457 (11th ed.), Lord Ellenborough in terms affirmed in respect of a building which had stood for twenty years, the right to support, "or as it were of leaning to the adjacent soil," by analogy to the case of lights. It is true that this ruling of Lord Ellenborough was questioned by the Lord Chief Baron Pollock in the case of *Solomon* v. *Vintners' Company*, 4 H. & N. 585. But the two cases were very dissimilar in their circumstances, and they may well stand together. In *Hide* v. *Thornborough*, 2 C. & K. 250, Parke, B. (afterwards Lord Wensleydale), held at Nisi Prius that where the house of the plaintiff had been supported for twenty years to the knowledge of the defendant, it had acquired a right to the support; and the observations of the same judge in *Gayford* v. *Nicholls*, 9 Ex. 702, are to the same effect. In *Brown* v. *Windsor*, 1 C. & J. 20, there was evidence of express assent on the part of the owner of the servient tenement to the plaintiff's house being rested upon his wall; but at the same time the judges, who decided the case, appear to have been clearly of opinion that apart from the

express assent, the acquiescence for twenty-seven years in the enjoyment of the support afforded presumptive proof of the right to the easement claimed. This case, however, was so special in its circumstances as not to afford much assistance upon the point under consideration. The case of *Partridge* v. *Scott*, 3 M. & W. 220, is a more important authority. There a house built more than twenty years before action stood upon land which had been excavated, according to the assumption of the court, within twenty years; and, if it had not been for the excavation of the land, the mining operation of the defendant on the adjacent soil would not have affected the house. The court in a considered judgment delivered by Alderson, B., decided that the right to lateral support for the house standing as it did upon excavated soil had not been acquired. But the judgment at the same time in substance affirmed these propositions, namely, first, that the house as an ancient house would, but for the excavation of the soil upon which it stood, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. *Rogers* v. *Taylor*, 2 H. & N. 828, was a case of subjacent support, in which there had been twenty years' enjoyment of the support, which, however, upon the trial was alleged on the part of the defendants to have been only a contentious enjoyment subject to acts negativing any right of support; the Lord Chief Justice himself, as I have already mentioned, tried the case, and he told the jury that he thought at the end of twenty years after the house had been built the plaintiff would have acquired a right to support, unless in the mean time something had been done to deprive him of it; that the jury must presume that the additional burden was put upon the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He thereupon left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the court. *Humphries* v. *Brogden*, 12 Q. B. 739, was a case of subjacent support of soil by soil, but the considered judgment of the Court of Queen's Bench, delivered by Lord Campbell, C. J., while affirming the existence of the right as a natural right of property unaffected by a reservation of minerals, went at great length into the analogies to be derived from the principles of law relating to rights of lateral support, and treated as unquestionable law the proposition, that a right to lateral support of a house by the adjacent soil may be acquired like

other easements by twenty years' uninterrupted enjoyment of such support. The language of the judgment upon this point is as follows: "Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house: *Stansell* v. *Jollard*, 1 Selw. N. P. 457 (11th ed.), and *Hide* v. *Thornborough*, 2 C. & K. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle" (page 749). The words "with his knowledge," used in the passage I have quoted, as well as in the ruling of Parke, B., in *Hide* v. *Thornborough*, must, I think, be referable to cases like *Partridge* v. *Scott*, 3 M. & W. 220, which is cited in the judgment, and to any other cases in which the circumstances of a house are of such a special character as to throw without the knowledge of the servient owner a greater than ordinary burden upon his tenement, and cannot be construed to mean that any special knowledge is required in the case of an ordinary house, which must as a matter of course, and to the knowledge of every person, increase by its downward pressure the lateral thrust of the soil upon which it stands. The question of knowledge, however, as affecting the present case is a material one, and will be considered by me more particularly before the close of this judgment. Lastly, comes the case of *Bonomi* v. *Backhouse*, E. B. & E. 646; 9 H. L. C. 503, the judgments and opinions in which certainly assume the right of lateral support to a building from adjacent land to stand as high as other easements, if indeed they do not treat it as one more nearly approaching a right of property, and as such, more easily to be acquired than an ordinary easement.

The result of the authorities which I have cited is to show that in the opinion of a large number of judges, ranging over a period of one hundred years, from 1761 to 1861, the grant of a right of support for buildings by adjacent soil is one subject to like conditions as, and which may be acquired in like manner with, easements generally by proof of uninterrupted enjoyment for twenty years. Against the consensus of *dicta* in support of this view no direct authority or even distinct *dictum* is produced. And under such circumstances I do not feel myself justified, even if I were so disposed, which I am not, in running counter to judicial views so long and so consistently entertained.

But the question still remains whether the right of support acquired

by user is an absolute one attaching itself to any house, which has stood the requisite time, or whether any and what limitation is to be put upon the right in this respect. I have already incidentally touched upon this question, and its answer, as it appears to me, is to be found in a reference again to the rule, that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and, as a consequence, no presumption of right in the dominant. If, therefore, a particular house were by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require an amount of support greater than houses of its kind usually require, I think that the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years' user a right to that extra support. If, on the other hand, a house is of ordinary stability and of reasonable construction, I think it equally clear that the owner of the adjacent soil must be assumed to know the amount of lateral support, which such a house must need, and is bound to afford it as a matter of right after the house has in fact enjoyed it for twenty years. This question was discussed but not decided in *Dodds* v. *Holme*, 1 Ad. & E. 493. In *Partridge* v. *Scott*, 3 M. & W. 220, the house was ancient, but the excavation which necessitated the additional support was assumed to be modern, and the judgment therefore in that case is not a direct authority upon the question; but the *dictum* contained in the judgment, that a grant of the additional support ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts, is a distinct intimation of the opinion of the court upon the question. If the knowledge on the part of the servient owner is required to make effective the enjoyment of additional support for a house where it is rendered necessary by the soil under it having been excavated, it must equally be required where, by reason of some internal alteration of the house itself, some special support beyond what the general construction and character of the house would indicate becomes necessary.

This, as I have already said, I infer to have been the meaning of Parke, B., in *Hide* v. *Thornborough*, and of the Court of Queen's Bench in *Humphries* v. *Brogden*, when they speak of knowledge as a necessary condition of the easement of support. It may be that in the case of the conveyance of one or both of two houses belonging to one owner, each of which is in fact enjoying, by virtue of some peculiarity of construction, a more than ordinary amount of support from the soil of the other, reciprocal grants of the right of support may be presumed without proof of notice or knowledge; but such a case involves different considerations to those which belong to ordinary cases of easements claimed by user, and it appears to me that to hold that a house, whatever be its construction and whatever the amount of support it may need, acquires, merely by twenty years' enjoyment of such support, an abso-

lute right to it, would be to run counter to well-established laws of easements as well as to offend against the principles of reason and justice, on which those laws are founded. Applying, then, these observations to the present case, I cannot concur in the ruling of Lush, J., at the trial, that where a building of any kind has stood for twenty years it has acquired an absolute right of support, without reference to the question of notice to the adjacent owner; and inasmuch as the effect of that ruling was practically to preclude the counsel for the defendants both from addressing the jury and, if they were so minded, from calling witnesses upon the question of notice, I feel a difficulty in seeing how, under such circumstances, a new trial can be refused to the defendants. But apart from what I hold to be the erroneous ruling of the learned judge, and assuming that his ruling had been founded upon the doctrine of an implied grant, I should still be forced to the conclusion that the defendants are entitled to a new trial. At the close of the plaintiffs' evidence the position of the case stood thus: the plaintiffs' witnesses had proved that the factory was of a construction reasonably stable, but had admitted at the same time that its construction was somewhat unusual. It was clear also that the result of the insertion into the chimney-stack of the girders supporting the upper floors was to concentrate a greater weight at one part of the building than would have been the case, if the girders had, on the side adjoining the defendants' soil, taken their bearings, as they did upon the opposite side, from a dividing wall; and the cross-examination upon this point had raised the issue of the reasonableness of such a method of construction: and lastly, although it was alleged on the part of the plaintiffs that the stack of brickwork would have fallen in consequence of the excavation upon the adjoining soil, without the extra weight of the upper floors of the factory upon it, the counsel for the commissioners distinctly intimated that he was prepared to negative by witnesses that allegation. This being the position in which the case stood, I cannot hold that the jury could be properly directed as a matter of law to presume a grant of the easement claimed upon the footing of its having been enjoyed with the knowledge of the defendants, and, as a consequence, with their acquiescence; and I think that the defendants' counsel were warranted in asking that the jury should determine whether the weight which had been put upon the adjoining soil was such as the owner of the soil could, under the peculiar circumstances of the case, be reasonably expected to be aware of and to provide for [pages 170–183].

[COTTON, L. J., agreed substantially with THESIGER, L. J.

BRETT, L. J., gave his opinion, that the right to the lateral support of buildings from soil was not a right of property, but an easement; that it could be given by express grant; that it was not within the Prescription Act; and that it could be "supported by the application of what has been called the doctrine of a lost grant" (page 198). He then continued:] I am thus brought to acquiesce in all the propositions in

which the learned judges of the Queen's Bench Division were agreed, and to have only further to give my opinion upon the proposition on which they differed.

Unless we are controlled by authority, we ought not, as it seems to me, to take what I will respectfully venture to call the bold step taken by Lush, J. He deprecates that which, he affirms, was an assumption of legislative power by the judges, who introduced the fiction of a lost grant; but, with deference, I think he exercises the power of legislation, and does not confine himself to the duty of declaration, when he holds that a twenty years' user without physical obstruction shall, of itself, as matter of law, confer a right, not because such facts bring the case within the Prescription Act, or the Limitation Act, but by judicial authority, because the Statute of Limitations has fixed twenty years as the limit, after which under certain conditions an action cannot be maintained for the recovery of real property. I incline to agree that the judges of former times did encroach upon the legislative function in what they held with regard to the doctrine of a lost grant, and to the effect they gave, in support of that doctrine and of the doctrine of prescription, to a user of twenty years. Yet so far as their ruling has been affirmed by courts, to whose decisions we owe obedience, we are, in my opinion, bound to accept and apply their ruling. But I do not think that any judges now should, in order to overcome a different apparent hardship or difficulty, follow their example. This then being the doctrine which is to be applied, a question has been raised whether, in applying it, it is necessary to find formally that there has been a grant which is lost, or whether it is sufficient without going on to find the inference that there has been a grant and that it is lost, to find the fact of an uninterrupted user for twenty years after knowledge of the burden imposed on the adjacent land. That must depend on whether the inference is to be treated as a necessary legal consequence or as an inference of a fact. If it is an inference merely of law, I can see no distinction, not even the slightest, between the doctrine or application of the doctrine of a lost grant, and the doctrine of prescription under the Prescription Act. If we were to hold that it is a mere inference of law, it seems to me that we should be doing in an analogous form precisely what was done by the judgment of Lush, J., which I think cannot be supported. Such a decision is legislation and not declaration. The forms of expression used by Lord Ellenborough, by Parke, B., and Bramwell, B., in the passages I have cited, are relied upon as showing, it is said, that in their opinion a twenty years' user, uninterrupted in fact, gives an absolute right, and therefore a right which cannot be contradicted, and therefore a right on the part of the plaintiff who has proved such user to a judgment thereupon that he has established his right. But those expressions are consistent with the view that those learned judges were speaking of the effect of evidence of user for twenty years *without any other evidence*, and as laying down that in such case in a trial before a judge and jury, the judge would be bound to direct the

jury to find the existence of a lost grant. They seem to me, when read with their context, to be only consistent with that interpretation of them. I do not believe that any one of those learned judges meant to say that in the case of a trial by judge and jury the plaintiff could succeed without a finding by the jury under direction, or upon consideration, of the existence of a lost grant: none of them meant to say that a special verdict would have been good which did not in terms find the existence of a grant. No case, I am sure, can be found in which on a trial with a jury the judge has not either directed the jury to find, or left to them to find, the fact as a fact whether there has been a grant. No judge could have called this doctrine a revolting doctrine, unless he had been of opinion that the jury must be asked to find the fact as an existing fact. If it were only an inference of law, there is nothing which can be called revolting in it. In order therefore to support such a claim, the existence of a lost grant must be found as a fact. If the case is tried before a judge without a jury, he must find such fact, though he may not do so in terms; if it is tried before a judge and jury, inasmuch as the judge cannot in such case determine any fact, it is the jury which must find the fact. This raises another question, namely, whether the judge may under certain circumstances direct the jury as matter of law to find the fact; and if he may, what are the circumstances under which he may or must do so. It is admitted by every one, I think, that he is bound to do so, where there is evidence of twenty years' uninterrupted user after knowledge of the facts and no other evidence. Now arises another question, which is, what other evidence is admissible or may be acted on? Is it only evidence of acts of interruption? or, although no act of interruption has been done, may evidence be given tending to show that no grant was in fact ever made? If the parties are alive, may they be called to prove conclusively that there never was a grant? If the question, whether there ever was a grant, is one of fact to be found by the jury, I know of no principle of law which can exclude evidence tending to show that there never in fact was such a grant. The legislature might forbid such evidence to be given, but there the legislature would in reality enact with regard to a right to lateral support a Prescription Act similar to that which they have enacted with regard to lights and rights of way. To introduce into the common law proposition as to a lost grant the limitation of interruption only by acts, is to introduce a limitation which it required an Act of Parliament to introduce in the case of lights and ways. The limitation as to them has been held to be an inference from the Statute. The legislature has not done so. The doctrine of inferring a lost grant was brought forward and applied, because there is no prescription. The distinction between the two doctrines and the legal mode of applying the latter seem to me to be clearly laid down by Lord Mansfield in *The Mayor of Hull* v. *Horner*, Cowp. 102. In that case the question was left to the jury, "whether they would not consider the usage from the year 1441 to the

time of action brought" (*i. e.*, in 1774) "sufficient ground to presume a grant of the duties between the 5th Richard 2 (*anno* 1382) and the year 1441." There had therefore obviously been an uninterrupted user for more than three hundred years, and yet the question was left to the jury. "Now with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, that all evidence is according to the subject-matter to which it is applied. There is a great difference between *length of time which operates as a bar* to a claim, and *that which is only used by way of evidence*. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But *length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances.*" And afterwards: "In questions of this kind possession goes a great way; but there is no positive rule which says that one hundred and fifty years' possession, or any length of time within memory, is a sufficient ground to presume a charter." He must, by the context, mean "to presume as *a presumption of law*." Again: "Under circumstances it may be left to the consideration of a jury or of a court of equity if the case comes properly before them, whether there is not a sufficient ground to presume a charter." The cases of *Campbell* v. *Wilson*, 3 East, 294; *Darwin* v. *Upton*, 2 Wms.'s Notes to Saund. 506; and *Cross* v. *Lewis*, 2 B. & C. 686, are precisely, as I understand them, to the same effect, namely, that although the user is for twenty years without interruption, the inference must be left to the jury.

I am, therefore, of opinion, in conclusion, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property, but that such a right may be established; that where it exists, it consists of a negative easement, by which the land of the adjacent owner is burdened with the servitude that it cannot be so used as to deprive the building of the adjacent owner of the support acquired by virtue of the easement, unless an equivalent support is supplied; that such an easement might be given at once by express grant of the owner of the servient property, and the servitude so imposed would pass with the land; that such a servitude might, as matter of law, be proved as by prescription at common law, but could hardly be so proved, as matter of fact, in accordance with the legal conditions of evidence as to such a prescription; that such

an easement is not within the Prescription Act (2 & 3 Wm. 4, *c.* 71); that such an easement, if it exist in a particular case, must, in contemplation of law, have originated in a grant; that the claim to it may be supported by evidence complying with the legal doctrine of an alleged lost grant; that if in any particular case evidence be given of the existence for twenty years, without interruption, of a building which for that period has required and had support from the soil of the adjacent owner, and the building is of such a nature or in such a position that it must have been apparent to any observant person that it required such support, or if the adjacent owner in fact had notice that it required such support, and if no evidence be given tending to show that there could not have originally been or that there was not and never had been a grant, the plaintiff would be entitled to a direction, as matter of law, to the jury to find for the plaintiff a right to support, as if he had a grant which is lost. If the existence of the building for twenty years be proved, but there is contradictory or doubtful evidence as to the question whether it must have been apparent that it required support, or whether the adjacent owner had notice that it required support, or of circumstances tending to show that there could not have been and was not and never had been any grant or the like, then the evidence must be left to the jury for them to say, whether they will or will not find for the plaintiff a right to support in respect of a grant which is lost. If there be no evidence of the existence of the building for twenty years, or if there be undisputed or necessarily conclusive evidence, or if it be admitted that there was no grant and never had been any grant, then the defendant is entitled to a direction, as matter of law, in his favor.

Upon the present occasion it seems to me that the case was at the trial treated by all the parties upon the footing that there was conclusive evidence, or an admission, that there never had been a grant. I am of opinion that there was no evidence of negligence in excavating. I am, therefore, of opinion that all the defendants were entitled to a decision in their favor, that the plaintiffs had no right to the support they claimed, and that they had given no evidence of negligence, and that therefore the plaintiffs had made no case against any of them. The point raised with regard to *Bower* v. *Peate*, 1 Q. B. D. 321, does not therefore become material. I, therefore, give no opinion upon it. The judgment should, in my opinion, be affirmed. *Judgment reversed* [pages 199–204].[1]

From this judgment the defendants appealed to the House of Lords. The appeals were first heard in November, 1879; and they were again heard in November, 1880, in the presence of the following judges,

[1] The order of the Court of Appeal directed that the defendants should elect within [illegible] days whether they would take a new trial, and if they did not so elect, that judgment should be entered for the plaintiffs for the amount of damages assessed by the special referee.

Pollock, B., *Field*, *Lindley*, *Manisty*, *Lopes*, *Fry*, and *Bowen*, JJ. 6 Ap. Cas. 740.

Sir F. Herschell, S. G., and *Wheeler*, for Dalton.

Sir J. Holker, Q. C., *Shield*, and *A. E. Gathorne-Hardy*, for the Commissioners.

Littler, Q. C., *Gainsford Bruce*, and *E. Ridley*, for the plaintiffs.

The following questions were put to the judges: —

1. Has the owner of an ancient building a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land?

2. Is the period during which the plaintiffs' house has stood, under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient?

3. If the acts done by the defendants would have caused no damage to the plaintiffs' building as it stood before the alterations made in 1849, is it necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support, after the lapse of twenty-seven years, an actionable wrong?

4. If so, is it sufficient to prove knowledge or notice of the fact that such alterations were made, or is it necessary also to prove knowledge of their effect, in causing the buildings so altered to require a degree of lateral support from the adjoining land which was not before needful?

5. Was the course taken by the learned judge at the trial, of directing a verdict for the plaintiffs, correct, or ought he to have left any question to the jury?

[The judges desired time to consider, and in March, 1881, delivered their opinions. All the judges answered the first question in the affirmative. *Pollock*, B., and *Field*, *Manisty*, and *Fry*, JJ., answered the second question in the affirmative, and the third in the negative; it was therefore unnecessary for them to answer the fourth question; they answered the fifth question in the affirmative. The following extracts from the opinion of *Manisty*, J., show the reasons for his answers; those of *Pollock*, B., and *Field*, J., were substantially the same. The learned judge said he founded his opinion upon the following propositions: —]

1. That the right to lateral support for buildings from adjacent soil is not the right to an easement in or over that soil, but is a right of property, namely, the right of the owner of the buildings to enjoy his property free from interruption by his neighbor, even though that interruption be caused by acts done by his neighbor in his own land which are in themselves lawful.

2. That this is not a natural right, but a right of property, which when acquired is of the same character as a natural right.

3. That a house or building which has stood for upwards of twenty years is in the eye of the law an "ancient" house or building.

4. That the law presumes, *until the contrary is proved*, that the owner of an ancient house, or building, who has enjoyed it free from interruption by a neighboring proprietor for upwards of twenty years, has acquired the right so to enjoy it for the future.

5. That the contrary may be proved, as I shall afterwards show; but the presumption of law cannot be rebutted by merely proving that no grant of support was in fact ever made by the neighboring proprietor [pages 767, 768] . . .

Assuming the right claimed to be a right of property such as I have endeavored to show it is, and that in the absence of any evidence to the contrary the law presumes it to have been acquired by uninterrupted enjoyment for twenty years and upwards, the question arises how may the contrary be proved. To this I answer, by evidence explanatory of the user, showing affirmatively that the owner of the buildings holds his property subject to the right of the owner of the subjacent or adjacent soil to take away the support. Such was the evidence given in *Rowbotham* v. *Wilson*, 8 E. & B. 123; 8 H. L. C. 348; *The Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377; *Angelo* v. *Seddon*, L. R. 10 Ch. 394, and other cases which might be cited to the like effect. It may be that the presumption might be rebutted in some other way, such as by showing that the owner of the adjacent or subjacent soil was under disability during the time when the right of support was alleged to have been acquired. It is unnecessary to express any opinion on that point, as no such question arose in the present case. If the presumption be one of law, it follows that neither positive acquiescence, nor a grant of support as a matter of fact by the owner of the neighboring soil is requisite for the acquisition of the right in question. If the view I take of the case be correct, then the long recognized right of the owner of an ancient house to enjoy it free from interruption by his neighbor will be preserved, and it will henceforth be based upon fact and a sound principle of law, instead of, as heretofore, upon fiction and unseemly verdicts of juries [page 771].

[The opinion of *Fry*, J., is given in full.]

Fry, J. My Lords, before specifically replying to the questions propounded by your Lordships, I think it desirable to express the views which I entertain upon the general subject of the right of the owner of a building to lateral support for that building by the land of an adjoining proprietor.

Such a right may be created by an actual instrument between the two owners. The right, being not to a thing to be done or used in the neighbor's soil, but to a limitation of the user of that soil by the neighbor himself, does not lie in grant, but would be created by a covenant by the neighbor not to use his own land in any manner inconsistent with the support of the adjoining buildings (see the judgment of Littledale, J., in *Moore* v. *Rawson*, 3 B. & C. 332, 340); and such a covenant might either be express, or might be inferred from the object and purport of the instrument, as in *Caledonian Railway Company* v. *Sprott*, 2 Macq. 449.

Leaving the consideration of the right as constituted by actual contract between the parties, questions of great difficulty arise; and, in respect of these, I have most unwillingly arrived at the conclusion that principle and authority are in direct opposition to one another.

On principle it appears to me that it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors. Such a principle would prevent the owner of a house from ever acquiring a right to lateral support except by actual contract. An opposite view might be taken, for which also much reason could be given. The right of soil to support by adjoining soil is given by our law as a natural right, and it might well have been held that this natural right to support carried with it a right to the support of all those burdens which man is accustomed to lay upon the soil. On this principle, the right to support would arise as soon as the house was built, and would exist independently of user, consent, or contract. It might thus, it appears to me, be reasonable to hold that a house should never have the right of support, or that it should always have it. But I am unable to find any principle upon which to justify the acquisition of the right to support by a house independently of express covenant or grant. For casting aside all technicalities, I think that the only principle upon which rights of a kind like the one in question can be acquired is that of acquiescence. But I further think that, as he who cannot prevent cannot acquiesce, and as the owner of adjoining land cannot prevent his neighbor from erecting a house upon his own land, he can never be said to have acquiesced in the construction of that house, or in the burden which thence results. Such are the conclusions to which I should be driven by a consideration of this question on principle. When I turn to the authorities of our law bearing on the subject, I find, as it appears to me, that it has been decided that an ancient house does possess the right in question; that a new house does not possess this right; and, consequently, that the right is one which may be acquired independently of express covenant. All the efforts which I have made to find some principle upon which to justify the authorities, have to my own mind entirely failed.

I must now consider somewhat more in detail the views which I have thus briefly expressed. In the absence of express stipulation, rights of the kind to which the one now in question belongs, can, in my opinion, arise in law only from one or other of two sources; namely, either as incidents attached to property by nature herself, or as incidents attached to property by the force of long-continued user under circumstances importing acquiescence in such user.

There is no doubt on the authorities that, as the support of soil by soil is in fact a result of nature, so the right to such support is given by the law as *ex jure naturæ*, and as a proprietary right. It arises in all its force the moment two adjoining pieces of land are held by different owners, and has no connection with the user of the land: *Humphries* v. *Brogden*, 12 Q. B. 739; *Rowbotham* v. *Wilson*, 8 E. & B. 123. But

it is equally clear on the cases that the right to support of buildings by land is not a right *ex jure naturæ*, but must arise by grant (or, as I think, more accurately speaking, by covenant). "Rights of this sort," said the Court of Exchequer in reference to the right of support of a house, "if they can be established at all, must, we think, have their origin in grant." See *Partridge* v. *Scott*, 3 M. & W. 228; and to the like effect are the judgments of the Queen's Bench in *Humphries* v. *Brogden*, and of the Exchequer Chamber in *Bonomi* v. *Backhouse*, E. B. & E. 646, 654.

That the right in question may be acquired, even where no instrument creating it is shown, is established as a matter of positive law by a series of authorities which appear to determine, 1, that the owner of an ancient building has a right of action against the owner of land adjoining, if he disturb his land so as to take away the lateral support previously afforded by that land, and 2, that the owner of a new building has no such right. The cases on these points are so fully cited and discussed by Lush, J., in the Queen's Bench Division, and by Thesiger, L. J., in the Court of Appeal, that it will be sufficient to refer to these judgments for their details. Suffice it to add that the authorities, commencing in the year 1803, include rulings at Nisi Prius by Lord Ellenborough, Lord Wensleydale, and the late Lord Chief Justice of England; an expression of opinion by Lord Blackburn; and judgments by the Courts of Exchequer and Common Pleas which assert or involve the propositions referred to; and, though no clear authority of an earlier date is found, the distinction between a new and an old house as regards the right to support appears to be hinted at in the cases of *Wilde* v. *Minsterley*, 15 Car. 1, 2 Roll. Abr. 564, Trespass, I. pl. 1, and of *Palmer* v. *Fleshees*, 15 Car. 2, 1 Sid. 167.

These cases constitute a body of authority, which, in my opinion, must be regarded as conclusive that, according to the law of England, an ancient house possesses a right to support from the adjoining soil; and, therefore, I answer your Lordships' first question in the affirmative.

From what I have said it follows that a right to support may, according to our law, be acquired independently of express contract; and, in order to answer your Lordships' second question, it becomes essential to inquire on what principle, in what time, and under what circumstances, it may be so acquired. Mere lapse of time can never, it appears to me, on any intelligible principle, confer a right not previously possessed; though lapse of time accompanied by inaction, where action ought to be taken, may well have such a result. "Mere lapse of time," said Chief Justice Dallas in *Gray* v. *Bond*, 2 B. & B. 671, "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Strictly speaking, the right in question cannot, I think, be prescribed for; for it is common learning that prescription can only be for incorporeal hereditaments "and cannot be for a thing which cannot be raised by grant" (2 Bl. Com., bk. ii. *c.* 17,

21st ed., p. 264), and, as I have already shown, the right in question does not, in my opinion, lie in grant.

But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of another; 2dly, the absence of right to do that act in the person doing it; 3dly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made, appears to me to be plain, both from reason, from maxim, and from the cases.

As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb.

Qui non prohibet quod prohibere potest, assentire videtur (Co. Inst. 2d part, vol. i. p. 305; *per* Parke, B., in *Morgan* v. *Thomas*, 8 Ex. 304); *Contra non valentem agere, nulla currit præscriptio* (Pothier, *Traité des Obligations*, part iii. chap. viii. art. 2, § 2; Broom's Maxims, 5th ed., 903), are two maxims which show that prescription and assent are only raised where there is a power of prohibition.

And again, the cases of *Chasemore* v. *Richards*, 7 H. L. C. 349; *Webb* v. *Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841; and *Sturges* v. *Bridgman*, 11 Ch. D. 852, have established a principle which was

stated by Willes, J., in *Webb* v. *Bird*, 10 C. B. N. S. at p. 382, in those terms. After alluding to the law relative to lights as exceptional, he proceeded, "In general a man cannot establish a right by lapse of time and acquiescence against his neighbor, unless he shows that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labor and expense." "Consent or acquiescence," said Thesiger, L. J., in delivering the judgment of the Court of Appeal in *Sturges* v. *Bridgman*, 11 Ch. D. 862, "of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi, nec clam, nec precario*; for a man cannot, as a general rule, be said to consent or to acquiesce in the acquisition by his neighbor of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence."

Assuming such to be the true grounds and principles of acquiescence, I next inquire how they can be applied to the question of the right of a house to be supported by the adjoining land.

It has been argued at your Lordships' bar that the doctrine applies in its simplest form to the right in question: for it has been contended that the act of building a house on one piece of land which derives lateral support from the adjoining soil of a different owner is both actionable and preventible, and that, therefore, time constitutes a valid bar. Is such a building actionable? I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbor's soil would no doubt be trespass; but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law, no one could rightly build on the edge of his land, unless he built upon a rock; and yet the building of walls and other structures on the borders of land is universally recognized as lawful. Nay more, any erection of a house would give a right of action not only to the adjoining neighbors, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the laws of physics, extend. Such an increase of pressure when unattended with ascertainable physical consequences is, in my opinion, one of those minima of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that

which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment.

Is the support of the house by the adjoining soil preventable? I think not. It is of course physically possible for one man so to excavate his own soil as to let down his neighbor's building, and a man may or may not have occasion to excavate his own land for his own purposes; but such an excavation for the sole purpose of letting down a neighbor's house is of so expensive, so difficult, so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right. In fact in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it.

In the case of air, it is physically possible for the adjoining owners to build a lofty wall round a windmill and shut out the access of air; and in case of underground water it would, at least in some cases, be physically possible to construct a water-tight barrier through all the water-bearing strata of the soil; but such acts would require such an unreasonable waste of time and money that the not doing of them has been held to import no acquiescence in the flow of air and water respectively: *Chasemore* v. *Richards*, 7 H. L. C. 349; *Webb* v. *Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841.

If the building of a house by one man which derives support from the adjoining land is neither actionable nor preventable by the owner of the adjoining soil, it seems difficult to see on what principle a covenant as to the user of his own soil can be inferred against the man who can do nothing.

The right to support and the rights to the access of light and air are very similar the one to the other, and are broadly distinguished from most other easements or analogous rights. They are negative as contrasted with affirmative easements. They are analogous with *servitutes ne facias* in the civil law. Such rights when they arise spring, not from acts originally actionable or unlawful on the part of the dominant owner, but from acts done on his own land and within his own rights; they confer on the dominant owner not the right to use the subject, but a right to forbearance on the part of the owner from using the subject, *i. e.*, they create an obligation on the owner of the servient tenement not to do anything on his own land inconsistent with a particular user of the dominant tenement. 2 Austin, Jurisp. 836, 3d ed. They rest on a presumption or inference not of a grant by the neighbor of a right to do something on the grantor's land, but of a covenant by the owner not to do something on his own land.

It is difficult in principle to see how such rights can arise from the doing of lawful acts on the dominant tenement, except in the few cases where the owner of the servient tenement can both lawfully and with reasonable ease interfere to prevent the continued user by his neighbor.

The close likeness between the right to support and to light has been much pressed on your Lordships, as a reason for inferring a right to support by analogy with the cases which before the Prescription Act

established the right to light. The peculiarity of these cases is that the courts required the servient owner to submit to the acquisition of the right by his neighbor or to signify his dissent by putting up an actual obstruction. "If his neighbor objects to them" (*i. e.*, to the windows), said Bayley, J., in *Cross* v. *Lewis*, 2 B. & C. 689, "he may put up an obstruction, but that is his only remedy." This rule as to light appears to have arisen without any full discussion in the courts of the principle on which it rests. But it is plain that the erection of an obstruction was thought so slight a matter that it might reasonably be demanded of the servient owner to negative acquiescence on his part. This rule I consider to be an anomaly, and therefore as not furnishing any principle which ought to be extended. "It is going very far," said Lord Wensleydale in *Chasemore* v. *Richards* in your Lordships' House, 7 H. L. C. 386, "to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years' enjoyment of light passing through a window." "These cases," said Willes, J., in *Webb* v. *Bird*, 10 C. B. N. S. 285, "as compared with the general law are anomalous." "The case of the right to light before the Statute stood on a peculiar ground," said Blackburn, J., in the same case, in the Exchequer Chamber, 13 C. B. N. S. 844. "Any one," said Bramwell, L. J., in *Bryant* v. *Lefever*, 4 C. P. D. 177, "who reads the cases relating to the acquisition of a right to light, will see that there has been great difficulty in establishing it on principle."

Accordingly, in *Chasemore* v. *Richards* your Lordships' House declined to apply the analogy drawn from lights to water passing through the earth in unascertained courses, and the Courts of Common Pleas, Exchequer Chamber, and Appeal have declined to apply it to the cases of air (*Webb* v. *Bird*, 13 C. B. N. S. 841; *Bryant* v. *Lefever*, 4 C. P. D. 177), and of noise (*Sturges* v. *Bridgman*, 11 Ch. D. 852).

Lastly, the way in which the Prescription Act deals with the right to light is significant of its anomalous character. It deals, on the one hand, with easements of an affirmative character which are capable of interruption by the servient owner. It deals, on the other hand, not with negative easements generally, but with the right to light alone of all the class to which it belongs. I believe that this argument, derived from the law of lights, has exercised a great influence on the establishment of the right to support: but I consider that in principle it affords no justification for the establishment of such a right. In order that acquiescence may arise, there must, in my opinion, be the power to prevent; and this I conclude, for the reasons I have given, is wanting in the case of the support of buildings by adjoining soil. But there is, in my humble opinion, equally wanting another element, namely, knowledge in the owner of the servient tenement. No doubt the owner of property knows or must be taken to know what occurs openly and visibly on his estate or in its immediate neighborhood, but not that which takes place underground or in a secret manner. Hence he is

justly charged with knowledge that his neighbor walks habitually over his land, or has erected a house with windows deriving light over his fields; but he would not be affected with knowledge of the user of a gangway or gallery constructed in the course of secret mining operations. Now the question whether a building does or does not derive any practical support from the neighboring land is one which it appears to me often extremely difficult to answer even for the building owner, and far more difficult to answer for the adjoining owner, who may be ignorant of the nature of the structure erected behind a hoarding; of the incidence of its burden on the soil; of the depth and character of the foundations, whether extending to the rock or resting on the surface soil; and of the nature of the subsoil itself. He may indeed excavate his own land and probably answer the last of these questions; but on the other topics he has no certain means of information, except by a trespass or an impertinence. It is evident that where the building is on the outcrop of strata, or where the beds have been intersected by dikes or disturbed by faults, it would be difficult or impossible to tell what is the incidence of the burden created by a house except by actual excavation and experiment. The circumstances of the case render it, in my opinion, unjust to impute to a neighbor that plain knowledge of what is going on in his neighborhood which can alone justify the depriving a man of a right to use his own land in a lawful manner.

In the case of *Solomon* v. *Vintners' Company*, 4 H. & N. 602, the question was as to the right of support of one house by another not immediately adjoining, on the ground of thirty years' enjoyment of such support; and there Bramwell, B., made some observations which seem very relevant to the present inquiry. Supposing such a right to exist, "it must," said the learned judge, "be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi*, *precario*, nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other; but it will be only a conjecture. . . . In fact it is impossible to say which house is being supported. It is true that in this case when the defendant's house was removed, the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If any one had done so, it would have been but a matter of conjecture. Therefore, supposing that the plaintiff for more than twenty years had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right;" . . . consequently, "no title was gained under any of the different ways in which it has been surmised it might have been gained." On principle I conclude, therefore, that acquiescence does not apply to the right in question.

Another argument in favor of the acquisition of the right in question has been based upon an analogy with the operation of the Statute of Limitations. "It seems to me," said Lush, J., 3 Q. B. D. 94, "to be the necessary consequence of the Limitation Act that such an easement" (*i. e.*, an easement not within the Prescription Act) "should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence; that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded in view of the necessary effect of the Limitation Act upon such an easement as this."

To the extent of holding that, if the right is to be acquired at all by lapse of time, twenty years is a reasonable period to confer the right, I think that the analogy is sound; but beyond that it appears to me not to go. The Statute of Limitations presupposes a right of action and takes it away if not put in force for twenty years; that furnishes no reason for casting a new burden upon a man where he has no capacity to bring an action or to create a physical obstruction to the exercise of the alleged right. To take away a right of action, if not put in force within a reasonable time, is one thing; to take away a man's right in his property because he does not bring an action which he cannot bring, seems to be quite another thing.

The authorities which establish this existence of the right in question afford no distinct statement of the principle upon which it reposes; but there are to be found in them references to the open character of the user, to the knowledge of the servient owner, and to the lapse of time, which seem to show that some notion of acquiescence was in the minds of the learned judges; but when I ask myself what difference it makes whether the user be open or secret to a man who cannot stop such user, what is the value of knowledge to a man who cannot act on it, and what is the effect of a lapse of time in the course of which nothing can be done, I find myself unable to answer these inquiries; and I think that the circumstances under which the building has been erected and the support enjoyed are immaterial. I regard the right as resting, not on any principle, but solely on a series of authorities which disclose no clear ground for their existence; but as it has been established that the right in question may be acquired by the lapse of time, I think that the period of twenty years may and ought to be held a sufficient one to confer the right.

The period of twenty years was that limited by the Statute 21 James I. c. 16, for bringing possessory actions and making entries; it was applied by the judges to cases of prescription, so that before the Pre-

scription Act, the uninterrupted enjoyment of an easement, for that length of time was constantly held to afford a ground for presuming the necessary grant or covenant; it has been referred to in *Stansell* v. *Jollard*, before Ellenborough, L., in 1803; 1 Selw. N. P. 10 ed. 135, tit. Consequential Damages; in *Dodd* v. *Holme*, 1 Ad. & E. 493; and in others of the authorities relative to this very right as sufficient to confer it; and it may well be maintained as reasonable in itself. I therefore answer your Lordships' second question in the affirmative.

I have already shown that I view the right in question as the result of an artificial rule of law, with which knowledge and acquiescence have nothing to do. I therefore answer your Lordships' third question by saying that in my opinion if the acts done by the defendants would have caused no damage to the plaintiff's building as it stood before the alterations made in 1849, it is not necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong.

For the reasons already given, I submit (in answer to your Lordships' fifth question) my opinion that the course taken by the learned judge at the trial of directing a verdict for the plaintiffs was correct, according to the law of England as it now stands. His conclusion involves the proposition that, by the mere act of his neighbor and the lapse of time, a man may be deprived of the lawful use of his own land, — a proposition which shocks my notions of justice, and against which I have struggled, but have struggled in vain; because, as I repeat with regret, I can find no reasonable proposition on which to rest the long line of decisions on the question before your Lordships. It would be presumptuous in me to inquire how far your Lordships will be bound by this long *catena* of authorities, or free to act on reason and principle, and I therefore humbly submit to your wisdom the conflict which appears to me to exist in this important case between the two governing principles of our laws.

[LINDLEY, J., was of opinion "that lapse of time is essential to the acquisition of a right to have a building supported by the land of another person, and that such right is by English law an easement or a right in the nature of an easement" (page 763); that "it is not a purely negative easement like the right to light; for support, even when lateral, involves pressure on and an actual use of the laterally supporting soil" (Ib.); and that he did not see "on principle" why an action might not be sustained without actual damage, but he added: "the authority against it, although purely negative, would, in my judgment, be considered as too strong to be got over" (page 764).

He further was of opinion that the difficulty of preventing the acquisition of a right to lateral support was much greater than that of preventing the acquisition of a right to light; but he thought that the authorities established that a right to lateral support could be acquired

in the same way in which a right to light could have been acquired before the Prescription Act, and that in "the face of this current of authority," he was "unable to come to the conclusion that the physical difficulty of obstruction brings the right to lateral support within the cases of *Webb* v. *Bird*, *Chasemore* v. *Richards*, and *Sturges* v. *Bridgman*" (page 765). He continued: —]

The theory of an implied grant was invented as a means to an end. It afforded a technical common law reason for not disturbing a long continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested, the presumption in favor of its legality ought to be made. Nor am I aware of any instance in the equity reports in which it has been held that an easement openly and uninterruptedly enjoyed for twenty years has been destroyed simply by proof that no grant under seal was ever in fact made. The theory of an implied grant, as distinguished from a legal presumption of some lawful origin, is, in my opinion, untenable and practically misleading, especially now that principles of equity as well as of law have to be applied both to trials with juries and to trials without. I feel a difficulty in saying that acquiescence on the part of the defendant is essential to the acquisition by the plaintiff of a right to support. No one can be properly said to acquiesce in what he cannot prevent; and it rarely happens that the use of land for lateral support can be practically prevented. Express dissent, *i. e.*, an express protest, would no doubt negative assent; and if acquiescence by the owner of the servient tenement is essential to the acquisition of a right to lateral support, a protest by him ought to be sufficient to prevent its acquisition. But I can find no trace of any authority to the effect that a protest would suffice for that purpose in this case any more than in other cases more or less similar, and I understand *Cross* v. *Lewis*, 2 B. & C. 686, to be an authority against the sufficiency of a protest in a case of light. Further, it is difficult to see why a protest should be required to preserve a right which is not being infringed. A protest is evidence of dissent, but nothing more; and until it is shown that assent is important, dissent cannot be of any avail. The only way in which I can reconcile the authorities on this subject is to hold that a right to lateral support can be acquired in modern times by an open uninterrupted enjoyment for twenty years, and that if such an enjoyment is proved the right will be acquired as against an owner in fee of the servient tenement, unless he can show that the enjoyment has been on terms which exclude the acquisition. Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right. In the absence of an uninterrupted open enjoyment, the right cannot be acquired, and the answer to your Lordships' second question appears to me to turn on whether the enjoyment in this particular case was open; and this again

appears to me to be a question of fact which ought to have been left to the jury. The learned judge who tried the case considered that as the plaintiff's building was openly built and enjoyed, it followed that he had openly enjoyed the support which he in fact had had. I do not think that this is a necessary inference; for the building was very peculiarly constructed, and I agree with Cotton and Thesiger, L. JJ., that the jury should have had their attention called to this point, and have been asked whether the plaintiff had in fact openly enjoyed the support the right to which he claimed [pages 765, 766].

[Lopes, J., contented himself with agreeing with Lindley, J. Bowen, J., gave a longer opinion, but reached the same conclusions.

The House of Lords took time to consider, and in June, 1881, they gave judgment.

Lord Selborne, L. C., thought that the easement was not purely negative, and that it came within the Prescription Act, but that if it did not, "a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user" (page 801); "that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam;* and that the evidence did not raise any question on this point which ought to have been submitted to the jury" (page 802).

Lord Penzance agreed with the views of Mr. Justice Fry.

Lord Blackburn, after expressing his opinion that the right to lateral support of a house could be acquired by prescription, and that a building "which has *de facto* enjoyed (under the circumstances and conditions required by the law of prescription) support for more than twenty years, has the same right as an ancient house would have had" (page 815), continued thus: —]

My Lords, I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbor's land exceeding what would, of common right, belong to the owner of that property, was acquiescence on the part of the neighbor. Nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a ground for finding that there was an actual assent; but that is, in many if not in all cases, a fiction: there is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called laches, and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of laches, than to say that for the public good the true owner shall lose his rights, if he has not exercised them during the prescribed period, whether there has been laches or not; but there is not much hardship. Presumably such rights if not exercised are not of much value, and though sometimes they are, *Ad ea quæ frequentius accidunt jura adaptantur.* This ground of acquiescence or laches is

often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shows that the principle on which prescription is founded is more extensive.

Prescription is not one of those laws which are derived from natural justice. Lord Stair, in his Institutions, treating of the law of Scotland, in the old customs of which country he tells us prescription had no place (book 2, tit. 12, § 9), says, I think truly, "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."

It was called by the old Roman lawyers *usucapio*, which is defined (Dig., lib. 41, tit. 3, *De usurpationibus et usucapionibus*, art. 3) to be "adjectio dominii per continuationem possessionis temporis lege definiti." And in the same book and title, art. 1, the reason is given: "Bono publico, usucapio introducta est ne scilicet quarumdam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium." This is precisely the object with which modern Statutes of Limitations are established, and it would be baffled if there was to be a further inquiry as to whether there had been acquiescence on the part of the true owner. It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern Statutes of Limitations; but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times. The minor question whether there should be a new trial, in my mind, depends on the question what positive laws have been adopted by the English courts. To return to the Roman law, *usucapio*, it will be noticed, was confined to the *dominium*, — nearly equivalent to the modern phrase of the legal estate. It was enunciated in the laws of the Twelve Tables, in terms brief, to the extent of being obscure, and simple to the extent of being rude, — "Usus auctoritas fundi biennium, cæterarum omnium annuus est usus." This for centuries, down to the time of Justinian, continued to be the law: so far as regarded the *dominium*, within the old territory of the Republic, but side by side with it, the Prætors introduced, by their edicts, a *jus prætorium*, nearly equivalent to the modern phrase of equity, which practically superseded the old law, and in the provinces was the only law. No one who has ever looked at the Digest will complain of the Prætorian law as brief, nor will any one who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the Prætors are so obviously just and expedient, and are so tersely expressed, that they have been gen-

erally adopted, and are quoted as legal maxims by those who often do not know whence they came. Two edicts were restitutory: "Prætor ait, Quod vi aut clam factum est qua de re agitur id cum experiendi potestas est, restituas" (Dig., lib. 43, tit. 24, art. 1). This relieved the true owner from the *usucapio* which transferred the *dominium* in consequence of a possession of two years if the possession was not peaceable or not open.

"Ait Prætor, Quod precario ab illo habes aut dolo malo fecisti ut desineres habere qua de re agitur, id illi restituas" (Dig., lib. 43, tit. 26, art. 2). This relieved him from the effect of a possession of two years if it was not adverse, or if it was fraudulent. By a prohibitory edict, *Uti possidetis* (Dig., lib. 43, tit. 17), the Prætor forbade any one to disturb, by force, any possession which had been obtained *nec vi*, *nec clam*, *nec precario*. And on the basis principally, but not exclusively, of those three edicts, the Prætors established what was called the *præscriptio longi temporis*. I will read what Pothier says in his treatise "De la Prescription. Article Préliminaire, Article 3." I quote from the eighth volume of Pothier's works by M. Dupin, p. 390: "Suivant ce droit du préteur le possesseur de bonne foi, qui avait eu une possession paisible et non interrompue soit d'un droit incorporel, soit d'un héritage qui n'était pas du nombre de ceux qui étaient *res mancipi* pendant le temps de dix ans *inter præsentes*, et de vingt ans *inter absentes*, acquérait après l'accomplissement du temps de sa possession, non le domaine de la chose, mais une prescription ou fin de non recevoir, à l'effet d'exclure la demande en revendication du propriétaire de la chose, qui n'aurait été intentée qu'après l'accomplissement de ce temps. Depuis, on avait aussi accordé une action utile à ce possesseur pour revendiquer la chose, lorsqu'il en avait perdu la possession après l'accomplissement du temps de la prescription." Thus the Prætors, whilst professing to leave the Law of the Tables in force, at least within the old territory of the Republic, practically deprived it of all force. Justinian by two laws (Codex, lib. 7, tit. 25), *De nudo jure Quiritium tollendo*, and tit. 31, *De usucapione transformanda*, changed all this. The two laws are couched in terms that show that those who framed them had very little respect for antiquity, and were intolerant of legal fictions. Justinian, says Pothier, by these enactments has changed the prescription of ten and twenty years into a true *usucapio*, for they have caused the *dominium* to pass to the possessor of the heritage, or the incorporeal right of which he has had during that time a possession or quasi-possession peaceable and not interrupted.

The name of prescription has, however, survived the thing. And in the numerous provinces into which France was before the Revolution divided, many of which were governed by their own customs, the laws of prescription varied. Domat in his treatise on the Civil Law (I quote from the translation by Doctor Strahan), book 3, title 7, § 4, says: "It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in

many of the customs. Every usage hath its views, and considers in the opposite usages their inconveniences. And it sufficeth to remark here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions. Which consists in two views: one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired." Those who framed the Code Napoleon had to make one law for all France. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil, Arts. 688, 689). These divisions, and the definitions, were, as far I can discover, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law authority before Gale on Easements in 1839. On this division their legislation was founded. The first Projet of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The Code Civil as it was finally adoped by Article 690, allows servitudes, if continuous and apparent, to be acquired by title or by possession for thirty years, and by Article 691 enacts that continuous servitudes not apparent, and servitudes, if discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired. The authors of *Les Pandectes Françoises* (Paris, 1804), on whose authority I state this, say (vol. v. p. 488) that this great change from the principle of the Projet was made without any publication of the discussions concerning it, or of the reasons that led to it. And they state more openly than I should have expected in a book published in Paris in 1804, that in their opinion it was not an improvement. It certainly has never been received in English law.

I think that what I have above stated is quite enough to confirm Lord Stair's position that the laws of different countries relating to prescription are positive laws differing in matter, manner, and time in different countries. I think that, though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, the very words of which are often quoted in the earliest English authorities, yet, to borrow the idea expressed by Domat in the passage I have above cited, every system of law is founded on its own ideas of expediency, and that we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient.

It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired

by enjoyment of an ancient window. The immemorial custom of London to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes* v. *Kime*, A. D. 1613 (Yelv. 215), proves the great antiquity of this law. But as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case*, 1 Leon. 168; Michaelmas, 29 & 30 Eliz., A. D. 1587. I will read the whole of it, for though the point actually decided was only that a window first erected in the reign of Queen Mary, that is, after 1553, and not later than 1558, had not acquired in 1587 the status of an ancient window, I think the opinion of the court on points not actually decided is important. "Bowry brought an action upon the case against Pope, and declared that in the time of Edward VI. the Dean and Chapter of Westminster leased two houses in St. Martin's, in London, to Mason for sixty years. The which Mason leased one of the said houses to one A., and covenanted by the indenture of lease with the said A. that it should be lawful for the said A., his executors and assigns, to make a window in the shop of the house so to him assigned, and afterwards in the time of Queen Mary a window was made accordingly where no window was there before. And afterwards A. assigned the said house to the plaintiff. And now Pope, having a house adjoining, had erected a new building *super solum ipsius Pope ex opposito* the said new window, so as the new window is thereby stopped. The defendant pleaded not guilty, and it was found for the plaintiff. And it was moved for the defendant in arrest of judgment that here upon the declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected, *scilicet* in the time of Queen Mary. The stopping of which by any act upon my own land was held lawful and justifiable by the whole court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole court. But if the case had been that the house and soil upon which Pope had erected the said building had been under the estate of Mason, who covenanted as above said, then Pope could not have justified the nuisance, which was granted by the whole court."

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on Littledale, J., in *Moore* v. *Rawson*, 3 B. & C. 332, and which leads Fry, J., in his very able opinion, to declare that this right does not lie in grant. They seem to have had no doubt that the express covenant operated as a grant of the window, and that neither Mason, nor any who held under his estate, could derogate from that grant by stopping the benefit of the window.

In Trinity, 29 Eliz., about nine months later, the Queen's Bench, in *Bland* v. *Moseley*, decided the second point resolved by the Common Pleas the same way, and they also seem to have agreed with the third

resolution. The case is cited in *Aldred's Case*, 9 Co. Rep. 58 b. The reasons, as reported by Lord Coke, are: "It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and Wray, C. J., then said that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said *et vescitur aura ætherea*, and the said words *horrida tenebritate* are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudatur que domus longos qua prospicit agros*. But the law does not give an action for such things of delight."

It will be noticed that not a word is said about the possibility of obstructing the light; and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbor's lights by hoardings, until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *Attorney-General* v. *Doughty*, 2 Ves. Sen. 453, where he observes that if that was the case, there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burden upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burden on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb* v. *Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841, and *Chasemore* v. *Richards*, 7 H. L. C. 349, are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction, the law has always, since *Bland* v. *Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

Shury v. *Pigott*, decided in 1625, is reported in Palmer, 444; Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; and W. Jones, 145. It seems to have excited a good deal of attention, and many things collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury* v. *Pigott* was, that in a

conveyance there was (though nothing was said) an implied grant that neither the conveyor nor any who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment, in that case an artificial supply of water, — a principle which, in the case of a house, would certainly include support.

In *Palmer* v. *Fleshees*, 1 Sid. 167, the first point ruled by Twysden and Wyndham, JJ., was, "if I, being seised of land, lease forty feet to A., to erect a house upon it, and other forty feet to B., to erect a house on it, and one of them builds a house, and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury* v. *Pigott's Case*, for each can make the best advantage of his own, but to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging." The reference to *Shury* v. *Pigott* shows that in this place "ancient" means "existing before the conveyance of the land." The point actually decided was as to light, and the *ratio decidendi* is thus stated in the report in 1 Levinz. 122. "It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder" (vendor) "can obstruct the lights any more than the builder himself could who cannot derogate from his own grant, by Twysden and Windham, JJ., Hyde being absent and Kelynge doubting. For the lights are a necessary and essential part of the house. And Kelynge said, Suppose the land had been sold first, and the house after, the vendee of the land might stop the lights. Twysden, to the contrary, said, Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights in the hands of the vendor or his assigns. But all agreed that a stranger having lands adjoining to a messuage newly erected, may stop the lights, for the building of any man on his lands cannot hinder his neighbor from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription." I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house; as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

Now, if the motive for introducing prescription is that given in the Digest, lib. xli., tit. 3, art. 1, quoted before, I think it irresistibly

follows that the owner of a house, who has enjoyed the house with a *de facto* support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by showing that it was not originally given to him. And I think that the decisions ending in *Backhouse* v. *Bonomi*, 9 H. L. C. 503, which is put in a very clear light by Manisty, J., in his opinion, decide that he should not be deprived of it. Fry, J., thinks those decisions are contrary to principle, but too strong to be departed from. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

But it still remains to inquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply.

In *Backhouse* v. *Bonomi*, 9 H. L. C. 503, the workings which did the mischief were at a considerable distance from the plaintiff's house, and would not have done any harm if the intervening minerals had not been previously removed by the defendant. Very different considerations may arise where the intervening minerals have been removed by the plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention the *Corporation of Birmingham* v. *Allen*, 6 Ch. D. 284, as Lush, J., did below, to show that it has not been overlooked.

Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon* v. *Vintners' Company*, 4 H. & N. 585, where it was said that, at all events, the right, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the defendants' land which they excavated was next adjoining to the plaintiffs' house; and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is, for the reasons given by Lush, J., 3 Q. B. D. 89, one very little onerous to the neighbors, and one which it is expedient to give to the owner of the house.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title.

But a question does arise as to whether there was not, or at least might have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the Praetor that possession must not be *vi vel clam*, as I think, is so far

adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the enjoyment was in the beginning wrongful, and the owner of the adjoining land may be said to have lost the full benefit of his rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was, and how far it went. But in a case of support where there is no laches, and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favor of quieting title; where that is the principle, I do not see that more can be requisite than to let the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence. And in the present case all that is suggested is that the plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and, as far as appears, would, but for the defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Any one who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned judge could, at the trial, on this evidence have left to the jury, beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighboring soil. The judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper story, and I cannot see what else could have been asked [pages 817–828].

[Lord Watson thought the right of lateral support was a positive easement, and agreed with the result arrived at by the other law lords.

Lord Coleridge simply expressed his agreement with the Lord Chancellor and Lord Blackburn; and the time given by the Court of Appeal to the defendants to exercise their option of a new trial having expired,]

Judgment was affirmed with costs.[1]

[1] All the courts and judges were of opinion that the Commissioners were liable for the act of Dalton, in accordance with *Bower* v. *Peate*, 1 Q. B. D. 321.

MELVIN *v.* WHITING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1830.

[*Reported* 10 *Pick.* 295.]

TRESPASS on the case for the destruction of the plaintiff's exclusive right to a fishery in Merrimack River in front of the plaintiff's lot and near the bank of the river included in the lot.

The plaintiff's claim was founded on an immemorial use and enjoyment of the fishery; and at the trial, before *Wilde*, J., he offered evidence tending to show that he and those under whom he claimed, had had quiet and peaceable possession of the same for more than *sixty* years before the injury complained of; and contradictory evidence was introduced by the defendant. The jury were instructed to find for the plaintiff, if they should be satisfied by the evidence, that he and those under whom he claimed had had possession of the fishery for sixty years; otherwise to find for the defendant.

The plaintiff contended that if he had had *forty* years' exclusive possession and use of the fishery, it would be sufficient to establish his title to the easement by prescription. This point was overruled, but the judge, intending to reserve the question in case a verdict should not be found for the plaintiff under the foregoing instructions, directed the jury to consider the evidence and ascertain whether the plaintiff and those under whom he claimed, had had *forty* years' exclusive and uninterrupted possession of the fishery.

The jury returned a verdict for the defendant; and they also found that the plaintiff and those under whom he claimed, had had forty-one years' exclusive and uninterrupted possession of the fishery. If in the opinion of the court the jury ought to have been instructed that forty years' uninterrupted enjoyment of an easement was sufficient to establish a title by prescription, a new trial was to be granted; otherwise judgment was to be rendered according to the verdict.

T. Fuller and *J. R. Adams*, for the plaintiff.

Stearns and *Hoar*, for the defendant.

WILDE, J., afterward drew up the opinion of the court. The plaintiff's counsel now move for a new trial, contending that forty years' quiet and uninterrupted and exclusive enjoyment of an easement is sufficient in this Commonwealth to establish a good title by prescription. It was agreed at the trial that this question should be reserved for the consideration of the court, if the jury should find, as they did, that the evidence to prove sixty years' possession was insufficient.

In *Coolidge* v. *Learned*, 8 Pick. 504, it was decided, that the time of legal memory or prescription in this Commonwealth does not extend further back than sixty years. This period was fixed on as limiting the time of legal memory, in analogy to the St. 1786, c. 13, limiting

the time for bringing actions by writ of right. By the same principle of analogy the time of legal memory was limited by the courts in England to the reign of Richard I., that being the limitation to a writ of right by Stat. Westm. 1.

It was the opinion of Rolle, (2 Roll. Abr. 269,) that when the limitation of a writ of right was reduced by the St. 32 Hen. 8, *c.* 2, to sixty years, a similar reduction should have been made in the limitation of the time of legal memory. This opinion was not adopted by the English courts, but in *Coolidge* v. *Learned* it is noticed with approbation, and the reasoning is said to be solid and satisfactory. Upon similar reasoning, as applicable to our Statute of Limitations of 1786, that case was decided: and the same reasoning seems to apply with equal force to the St. 1807, *c.* 75, by which the limitation of the writ of right was reduced to the term of forty years. A writ of right is the highest writ in the law, and if this is barred by the adverse possession of any lands or other real estate, for forty years, no reason can be given why the use and enjoyment of an easement for a like term of time should not make a good title by prescription. It is said in Viner, that "it was reason that the inquiry in a prescription should be limited as well as in a writ of right, being more base than that; for it would be hard to put juries to inquire of things so ancient." 17 Vin. Abr. 272, Prescription, M. On this principle the time of legal memory in England was limited to the commencement of the reign of Richard I. The same reason exists for limiting it here to the period of forty years. Upon a like analogy to another clause in the Statute of Limitations, it has been established that the adverse, uninterrupted use and enjoyment of an easement for the period of twenty years, is sufficient to authorize the presumption of a grant: "For," says Starkie, "as an adverse possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of right to a minor interest arising out of the land." 3 Stark. Ev. 1215.

For these reasons, and upon these authorities and decisions, we are of opinion, that the exclusive, uninterrupted use and enjoyment of an easement, or incorporeal right, affecting the lands of another, for the period of forty years, is sufficient to establish in this Commonwealth a good right and title by prescription. In thus deciding, we adopt and follow the principles of the English law of prescription, rejecting only that part of the doctrine which is inapplicable to this country, and which even in England renders the law of prescription, at the present day, of very little practical utility and importance.

New trial granted.

MELVIN *v.* WHITING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[*Reported* 13 *Pick.* 185.]

ACTION on the case for a disturbance of the plaintiff's several fishery in Merrimac River. Pleas, 1. The general issue; 2. That the defendant was seised in fee of the close etc., being part of the bed of the river, covered with stone, useful for building, which he had occasion to quarry, and, therefore, he removed the plaintiff's nets and pots as carefully, etc. Replication, traversing the defendant's seisin, and tendering an issue thereon, which is joined. At the trial, however, the right of soil was not seriously contested, but the plaintiff relied on his title to a several fishery on the defendant's soil.

The cause was tried before *Shaw*, C. J., and after a verdict for the plaintiff, the defendant moved for a new trial, on several grounds.[1]

The plaintiff, in support of his title to a several fishery in the soil of the defendant, relied upon proof of use and enjoyment as evidence of a grant, no deed from the defendant, or any one under whom he holds, being offered. There was evidence tending to show that Melvin, and those under whom he claims, used and enjoyed the right of fishing exclusively and adversely to Andrew Fletcher and his heirs, under whom Whiting claims, for some period in Fletcher's lifetime: that Fletcher died intestate, leaving seven children and heirs, all minors; that after they came of age their estate, through mesne conveyances, passed to Whiting: and that the plaintiff's exclusive possession remained uninterrupted by any adverse act or claim of the heirs, or of any person claiming under them, until it was interrupted by Whiting.

The jury were instructed, that to raise such presumption of a grant, it must appear that such exclusive right had been used and enjoyed against those who were able in law to assert and enforce their rights, and to resist such adverse claim if not well founded, and therefore, that if the persons against whom such right is claimed, were under the disability of infancy, the time during which such disability continued was to be deducted, in the computation of twenty years; and that if the jury found that the adverse possession in the lifetime of Fletcher, added to that which was held after his heirs became of age (there having been no interruption in the mean time), amounted together to the period of twenty years' adverse possession, then they should find for the plaintiff. This instruction, to which the defendant excepted, constituted the second ground of the motion for a new trial.

Hoar and *Stearns*, in support of the motion for a new trial.

T. Fuller, contra.

[1] Only that part of the case which relates to the second ground for a new trial is given.

WILDE, J., delivered the opinion of the court. This is an action of trespass on the case for disturbance of a fishery in Merrimac River. After a verdict for the plaintiff, the counsel for the defendant moved for a new trial, on several grounds, and the question is, whether upon the facts reported the plaintiff is entitled to judgment.

The plaintiff claimed title to a several fishery on the soil of the defendant, on the presumption of a non-existing grant, and relied on the proof of an adverse, uninterrupted and exclusive use and enjoyment of the right and privilege claimed, for more than twenty years before the commencement of this action; and the jury were instructed, that upon satisfactory proof of such use and enjoyment, they were authorized to presume a grant. They were also instructed, that to raise such a presumption, it must appear that such exclusive right had been used and enjoyed against those who were able in law to assert and enforce their rights, and to resist such adverse claim if not well founded; and therefore, that if the persons against whom such right is claimed, were under the disability of infancy, the time during which such disability continued was to be deducted in the computation of the twenty years. These instructions are manifestly correct, and it is not denied that the evidence was such as would warrant the jury to find a verdict in pursuance thereof for the plaintiff, provided the use and enjoyment by the plaintiff, and that by those under whom he claims, may be coupled, so as to make up the twenty years, notwithstanding the intervention of the rights of Fletcher's heirs and their disability; and we have no doubt that they may. If it were otherwise, it would be difficult to maintain the presumption of a grant by any lapse of time and continuance of possession, if death should intervene in every period of twenty years, so that a man and his ancestors might have the uninterrupted use and enjoyment of a privilege or easement for a century, without acquiring any right; which cannot be maintained. It is admitted that no authority has been found to sanction such a doctrine, and very clearly it cannot be supported on principle.

Judgment according to verdict.

PARKER *v.* FOOTE.

SUPREME COURT OF NEW YORK. 1838.

[*Reported* 19 *Wend.* 309.]

THIS was an action on the case for stopping *lights* in a dwelling-house, tried at the Oneida Circuit in April, 1836, before the Hon. *Hiram Denio*, then one of the circuit judges.

In 1808 the defendant, being the owner of two village lots situate in the village of Clinton, adjoining each other, sold one of them to Joseph Stebbins, who in the same year erected a dwelling-house

thereon, *on the line* adjoining the other lot, with windows in it overlooking the other lot. The defendant also in the same year built an addition to a house which stood on the lot which he retained, leaving a space of about *sixteen feet* between the house erected by Stebbins and the addition put up by himself. This space was subsequently occupied by the defendant as an alley leading to buildings situate on the rear of his lot, and was so used by him until the year 1832, when (*twenty-four years* after the erection of the house by Stebbins,) he erected a store on the alley, filling up the whole space between the two houses, and consequently *stopping the lights* in the house erected by Stebbins. At the time of the erection of the store, the plaintiffs were the owners of the lot originally conveyed to Stebbins, by title derived from him, and were in the actual possession thereof, and brought this action for the stopping of the lights. Stebbins (the original purchaser from the defendant,) was a witness for the plaintiffs, and on his cross-examination testified that he never had any written agreement, deed or writing, granting permission to have his windows overlook the defendant's lot, and that nothing was ever said upon the subject. The village of Clinton is built upon a square called Clinton Green, the sides of the square being laid out into village lots, and contained at the time of the trial about one thousand inhabitants. On motion for a nonsuit, the defendant's counsel insisted that there was no evidence of a *user* authorizing the presumption of a grant as to the *windows;* that the *user* in this case was merely permissive, which explained and rebutted all presumption of a grant. That if the *user*, in the absence of other evidence, authorized the presumption of a grant, still that here the presumption was rebutted by the proof, that in fact there never had been a grant. The circuit judge expressed a doubt whether the modern *English* doctrine in regard to stopping lights was applicable to the growing villages of this country, but said he would rule in favor of the plaintiffs, and leave the question to the determination of this court. He also decided that the fact, whether there was or was not a grant in writing as to the windows, was not for the jury to determine; that the law presumed it from the user, and it could not be rebutted by proving that none had in truth been executed. After the evidence was closed, the judge declined leaving to the jury the question of presumption of right, and instructed them that the plaintiffs were entitled to their verdict. The jury accordingly found a verdict for the plaintiffs, with $225 damages. The defendant having excepted to the decisions of the judge, now moved for a new trial.

W. C. Noyes, for the defendant.

C. P. Kirkland and *J. A. Spencer*, for the plaintiffs.

By the Court. (Bronson, J.) The modern doctrine of presuming a right, by grant or otherwise, to easements and incorporeal hereditaments after twenty years of uninterrupted adverse enjoyment, exerts a much wider influence in quieting possession, than the old doctrine of title by prescription, which depended on immemorial usage. The

period of twenty years has been adopted by the courts in analogy to the Statute limiting an entry into lands; but as the Statute does not apply to incorporeal rights, the adverse user is not regarded as a legal bar, but only as a ground for presuming a right, either by grant or in some other form. The case of *Holcroft* v. *Heel*, 1 Bos. & Pull. 400, apparently proceeds on the ground of a legal bar; but the report is inaccurate, as will be seen by the explanation of Le Blanc, J., in *Campbell* v. *Wilson*, 3 East, 298.

To authorize the presumption, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner. *Campbell* v. *Wilson*, 3 East, 294; *Daniel* v. *North*, 11 East, 372; *Barker* v. *Richardson*, 4 B. & Ald. 579; *Hill* v. *Crosby*, 2 Pick. 466; *Sargent* v. *Ballard*, 9 Pick. 251; *Bolivar Comp.* v. *Neponset. Comp.*, 16 Pick. 241; *Chalker* v. *Dickinson*, 1 Conn. R. 382. See also *Doe* v. *Butler*, 3 Wendell, 149. It is said that there may be cases relating to the use of water, which form exceptions to the rule that the enjoyment must be adverse to authorize the presumption of a grant. See *Bealey* v. *Shaw*, 6 East, 208; *Ingraham* v. *Hutchinson*, 2 Conn. R. 584. To this doctrine I cannot subscribe. Without reviewing the cases in relation to the rights of different riparian proprietors on the same stream, I think it sufficient at this time to say, that in whatever manner the water may be appropriated or enjoyed, it must of necessity be either rightful or wrongful. The use of the stream must be such as is authorized by the title of the occupant to the soil over which the water flows, or it must be a usurpation on the rights of another. If the enjoyment is rightful, there can be no occasion for presuming a grant. The title of the occupant is as perfect at the outset, as it can be after the lapse of a century. If the user be wrongful, a usurpation to any extent upon the rights of another, it is then adverse; and if acquiesced in for twenty years, a reasonable foundation is laid for presuming a grant. If the enjoyment is not according to the title of the occupant, the injured party may have redress by action. His remedy does not depend on the question whether he has built on his mill-site, or otherwise appropriated the stream to his own use. It is enough that his right has been invaded; and although in a particular case he may be entitled to recover only nominal damages, that will be a sufficient vindication of his title, and will put an end to all ground for presuming a grant. *Hobson* v. *Todd*, 4 T. R. 71; *Bolivar Co.* v. *Neponset Co.*, 16 Pick. 241; *Butman* v. *Hussey*, 3 Fairfield (Me.) 407.

The presumption we are considering is a mixed one of law and fact. The inference that the right is in him who has the enjoyment, so long as nothing appears to the contrary, is a natural one, — it is a presumption of fact. But adverse enjoyment, when left to exert only its natural force as mere presumptive evidence, can never conclude the true owner. No length of possession could work such a consequence.

Hence the necessity of fixing on some definite period of enjoyment, and making that operate as a presumptive bar to the rightful owner. This part of the rule is wholly artificial; it is a presumption of mere law. In general, questions depending upon mixed presumptions of this description must be submitted to the jury, under proper instructions from the court. The difference between length of time which operates as a *bar* to a claim, and that which is only used *by way of evidence*, was very clearly stated by Lord Mansfield, in the *Mayor, &c.* v. *Horner*, Cowp. 102. "A jury is concluded," he says, "by length of time that operates as a bar, as where the Statute of Limitations is *pleaded in bar* to a debt: though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But length of time *used merely by way of evidence*, may be left to the consideration of a jury to be credited or not, and to draw their inference one way or the other, according to circumstances." In *Darwin* v. *Upton*, 2 Saund. 175, note (2), the question related to lights, and it was said by the same learned judge that "acquiescence for twenty years is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an absolute bar, like a Statute of Limitations; it is certainly a presumptive bar which ought to go to the jury." Willes, J., mentioned a case before him, in which he held uninterrupted possession of a pew for twenty years to be presumptive evidence merely; in which opinion he was afterwards confirmed by the C. B. The other judges concurred; and Gould, J., before whom the action was tried, said he never had an idea but it was a question for a jury; and he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion.

Some of the cases speak of the presumption as conclusive. *Bealey* v. *Shaw*, 6 East, 208; *Tyler* v. *Wilkinson*, 4 Mason, 397. This can only mean that the presumption is conclusive, where there is no dispute about the facts upon which it depends. It has never been doubted that the inference arising from twenty years' enjoyment of incorporeal rights, might be explained and repelled; nor, so far as I have observed, has it ever been denied that questions of this description belong to the jury. The presumption we are considering has often been likened to the inference which is indulged that a bond or mortgage has been paid, when no interest has been demanded within twenty years. Such questions must be submitted to the jury to draw the proper conclusion from all the circumstances of each particular case. *Jackson* v. *Wood*, 12 Johns. R. 242; *Jackson* v. *Sackett*, 7 Wendell, 94. In *Sivett* v. *Wilcox*, 3 Bing. 115, the question was on a right of way: the defendant pleaded a grant, and the judge left it to the jury to say, whether they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed; and Best, C. J., said the direc-

tion was perfectly right. He added, "I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a judge would not be justified in saying that they *must*, but that they *may* presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly." In *Hill* v. *Crosby*, 2 Pick. 466, the court set aside the verdict, although they thought it right, because the question had not been referred to the jury.

In a plain case, where there is no evidence to repel the presumption arising from twenty years' uninterrupted adverse user of an incorporeal right, the judge may very properly instruct the jury that it is their duty to find in favor of the party who has had the enjoyment; but still it is a question for the jury. The judge erred in this case in wholly withdrawing that question from the consideration of the jury. On this ground, if no other, the verdict must be set aside.

The bill of exceptions presents another question which may probably arise on a second trial, and it seems proper therefore to give it some examination.

As neither light, air, nor prospect can be the subject of a *grant*, the proper presumption, if any, to be made in this case, is, that there was some *covenant* or *agreement* not to obstruct the lights. *Cross* v. *Lewis*, 2 Barn. & Cress. 628, *per* Bayley, J.; *Moore* v. *Rawson*, 3 Barn. & Cress. 332, *per* Littledale, J. But this is a matter of little moment. Where it is proper to indulge any presumption for the purpose of quieting possession, the jury may be instructed to make such a one as the nature of the case requires. *Eldridge* v. *Knott*, Cowp. 214.

Most of the cases on the subject we have been considering, relate to *ways*, *commons*, *markets*, *watercourses*, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of *windows* overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window. *Chandler* v. *Thompson*, 3 Campb. 80; *Cross* v. *Lewis*, 2 Barn. & Cress. 686, *per* Bayley, J. Upon what principle the courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over, or feed his cattle upon it; or divert the water from his mill, or throw it back upon his land or machinery; in these and the like cases, long-continued acquiescence affords strong presumptive

evidence of right. But in the case of lights, there is no *adverse user*, nor indeed any use whatever of another's property; and no foundation is laid for indulging any presumption against the rightful owner.

Although I am not prepared to adopt the suggestion of Gould, J., in *Ingraham* v. *Hutchinson*, 2 Conn. R. 597, that the lights which are protected may be such as *project* over the land of the adjoining proprietor, yet it is not impossible that there are some considerations connected with the subject which do not distinctly appear in the reported cases. See *Knight* v. *Halsey*, 2 Bos. & Pull. 206, *per* Rooke, J., 1 Phil. Ev. 125.

The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may *lawfully* have windows looking out upon the lands of his neighbor. 2 Barn. & Cress. 686; 3 Id. 332. The reason why he may lawfully have such windows, must be, because he does his neighbor no wrong; and indeed, so it is adjudged as we have already seen; and yet somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner, remains yet to be settled. 2 Barn. & Cress. 686; 2 Carr. & Payne, 465; 5 Id. 138. Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a *lawful* right on the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be, — not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done in one's own land, is calculated to render a man odious. Indeed, an attempt has been made to sustain an action for erecting such a wall. *Mahan* v. *Brown*, 13 Wendell, 261.

There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; and I see that it has recently been sanctioned, with some qualification, by an Act of Parliament. Stat. 2 & 3 Will. 4, c. 71, § 3. But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law. 3 Kent's Comm. 446, note (a). Nor do I find that it has been adopted in any of the States. The case of *Story* v. *Odin*, 12 Mass. R. 157, proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law

of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. Const. N. Y., art. 7, § 13. There were two *nisi prius* decisions at an earlier day, (*Lewis* v. *Price*, in 1761, and *Dougal* v. *Wilson* in 1763,) but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin* v. *Upton* was decided by the K. B. 2 Saund. 175, note (2). This was clearly a departure from the old law. *Bury* v. *Pope*, Cro. Eliz. 118.

There is one peculiar feature in the case at bar. It appears affirmatively that there never was any grant, writing or agreement about the use of the lights. A grant may under certain circumstances be presumed, although, as Lord Mansfield once said, the court does not really think a grant has been made. *Eldridge* v. *Knott*, Cowp. 214. But it remains to be decided that a right by grant or otherwise can be presumed when it plainly appears that it never existed. If this had been the case of a way, common, or the like, and there had actually been an uninterrupted adverse user for twenty years under a claim of right, to which the defendant had submitted, I do not intend to say that proof that no grant was in fact made would have overturned the action. It will be time enough to decide that question when it shall be presented. But in this case the evidence of Stebbins, who built the house, in connection with the other facts which appeared on the trial, proved most satisfactorily that the windows were never enjoyed under a claim of right, but only as a matter of favor. If there was anything to leave to the jury, they could not have hesitated a moment about their verdict. But I think the plaintiffs should have been nonsuited.

The CHIEF JUSTICE concurred on both points.

COWEN, J., only concurred in the opinion that the question of presumption of a grant should have been submitted to the jury.

New trial granted.[1]

LAMB *v.* CROSLAND.

COURT OF APPEALS OF SOUTH CAROLINA. 1850.

[*Reported* 4 *Rich.* 536.]

THIS was an action on the case for obstructing a ditch.

The lands of the parties were adjoining. The plaintiff's land, in 1817, belonged to her husband, one Alexander Lamb. The defendant's land, then, belonged to one Bartholomew Cosnahan. Near Lamb's

[1] See *contra*, *Clawson* v. *Primrose*, 4 Del. Ch. 693 (1873). *Parker* v. *Foote* was followed in a case of lateral support, *Mitchell* v. *Rome*, 49 Ga. 19 (1873). So *semble*, *Tunstall* v. *Christian*, 80 Va. 1 (1885).

house were some ponds, which, in wet seasons, were filled with water, and produced sickness. Lamb asked and obtained permission from Cosnahan to cut a ditch through his land, for the purpose of draining those ponds. The ditch communicated with an old ditch, called the meadow ditch, by which the water passed off into Crooked Creek. The land through which the ditch was cut by Lamb, was then woodland; it had since been cleared. The ditch had been kept open as a drain for Lamb's land ever since, and worked on occasionally, when it suited the convenience of those who owned the land. The plaintiff was in possession of Lamb's land. Lamb died in 1836. No evidence of how the plaintiff derived title was given; but it was understood, from the course of the testimony, that it had been sold for partition, and she was the purchaser. B. Cosnahan died in 1820, leaving a widow and infant children, one of whom was not of age until 1841. After his death, the land remained in the possession of his widow and the administrator, until 1833, when it was sold for partition, and purchased by one E. Cosnahan, who sold it to one Feagin in 1836. From him it passed to Green. About 1843, he sold to Dudley, and Dudley to the defendant. In 1847, (in January,) in consequence of the lower part of the ditch not being kept sufficiently open, four acres of the defendant's land, on the side of the ditch, were too wet to plough. He sent to the plaintiff, requested her to open it, but she did not do it. In March, the defendant filled up the ditch with dirt and logs. Some negotiation took place, and the plaintiff opened the ditch, but, as it turned out, not sufficiently, for in July there were very heavy rains, and the water ponded on the four acres, and injured the growing crop. The defendant again obstructed the ditch. It remained so four days, when the plaintiff's son removed the obstruction. But in these four days, the corn in the plaintiff's pond was destroyed. For this injury the action was brought, and the sole question presented by the case was, whether the plaintiff had a prescriptive right to drain her land through this ditch. If she had, the defendant had no right to obstruct it. If she had not, then the defendant had a right to fill it up on his own land.

Evidence was given on the question, whether the use had been adverse, or only permissive. That question was submitted to the jury, who found for the plaintiff.

In his report of the case, his Honor, the presiding judge [*Evans*, J.], says: —

"It was very clear, that from 1820 to 1833, the land of defendant belonged to infants; and there was not the slightest evidence to change the original character of the use, up to the death of B. Cosnahan. My own opinion, founded on a pretty full argument, made in the case of *Hopkins v. Causey*, which I tried at Kershaw, was, that the presumption of title, arising from adverse use, did not arise when the owners were, at the time of its commencement, infants; and that, even in cases of intervening infancy, the presumption was suspended during infancy. For the presumption depends, not on the use alone, but the acquiescence

of the owner. In this case, there is no doubt about the facts. The use began in 1817, and continued to 1847, a period of thirty years. But during the time, the land belonged to infants thirteen years, leaving only seventeen years. Entertaining this opinion, if I had left that point to the jury, they of course would have found for the defendant; but I did not feel at liberty, after having spent more than a day on the trial, to arrest the case by a nonsuit, on an undecided point, and one of difficult solution. The case was sent to the jury on the other points, reserving to the defendant the right to renew his motion in the Appeal Court."

The defendant appealed, and now moved for a nonsuit, or new trial, on several grounds; the fourth ground for a nonsuit was as follows:

Because, admitting that the plaintiff had adverse possession for twenty-nine years, it was in evidence, that for thirteen years of this time, the proprietors of the servient tenement were infants, against whom an adverse possession could not grow into a right.

Dudley, for the motion.

Thornwell, contra.

CURIA, PER EVANS, J. There are several questions presented by the brief in this case, but as the decision depends on the fourth ground for a nonsuit, none of the other questions will be considered. That ground is in the following words, to wit, "admitting that the plaintiff had adverse possession for twenty-nine years, thirteen years of this time the proprietors of the servient tenement were infants, against whom an adverse possession could not grow into a right." The facts of the case, necessary to be stated in order to understand this ground, are these. In 1817, the ditch, which was the subject of controversy, was dug by Lamb through Cosnahan's land, by his permission or consent, for the purpose of draining some ponds on the land of Lamb. The ditch has been kept open ever since, until obstructed by the defendant, who now owns the land. In 1820, Cosnahan died, leaving a widow and infant children his heirs at law, one of whom was not of age until 1841. In 1833, the land was sold, under a decree of the Court of Equity, for partition, and purchased by one E. Cosnahan, from whom, by several intermediate conveyances, the defendant derives his title. The question arising on these facts is, whether the plaintiff, who is the owner of Lamb's land, to drain which the ditch was dug, has acquired, by the use thereof, a right of drainage against the owner of the land. There is no doubt that, according to our law, as declared in a great many cases, the adverse use of an easement for twenty years will confer a right to the use of it, as fully as if a deed for it were produced and proved. In the ordinary transactions of mankind, we find that men are not disposed to allow others to exercise dominion over their property. When, therefore, we find that such dominion has been exercised for a long period, without objection on the part of the owner, it is reasonable to conclude that such use began in right, or it would have been objected to. This title is founded on the presumption of a grant, which

time or accident has destroyed. But this is perhaps a legal fiction, which the law resorts to, to support ancient possessions, and to maintain what the acts of the parties show they considered to exist.

There can be no doubt that, if Cosnahan had lived for twenty years after the use of the ditch commenced, and Lamb had used it adversely, as the jury have found, the right would have been perfect; and I suppose it equally clear, that if the time before Cosnahan's death, added to the time which elapsed after the sale in 1833, together, made the full period of twenty years, the right would be beyond dispute. For in both cases there would be an adverse use, and an acquiescence by those laboring under no disability, for the full period that the law requires to support the presumption of a grant.

In this case these two periods of time amount to only seventeen years, and unless the presumption can arise against the infants, the twenty years is incomplete.

In McPherson on Infants, it is said, (p. 538,) "It is a maxim of law, that laches is not to be imputed to an infant, because he is not supposed to be cognizant of his rights, or capable of enforcing them." In Bacon's Abridg. Title, Infant, G. (5 vol. 110), last edition, it is said: "The rights of infants are much favored in law, and regularly their laches shall not prejudice them, upon the presumption that they understand not their rights, and that they are not capable of taking notice of the rules of law so as to apply them to their advantage." The same doctrine is to be found in all the elementary writers from Coke to the present time. The presumption arises from the acquiescence of the parties interested to dispute it, and it would be difficult to assign a reason for drawing any conclusion from the acquiescence of an infant, who is supposed in law not to be cognizant of his rights, or capable of enforcing them. Accordingly we find, that in all the cases which have been decided, so far as I know, no presumption has been allowed against the rights of an infant, whether the question related to the satisfaction of bonds for the payment of money, or the performance of other acts, or to rights growing out of what Best calls a *non-existing grant*.[1] In *Boyd* v. *Kirk*, decided in 1830, it was held that no presumption could arise that the condition of a bond of an administrator had been performed, because the distributee, to whom he was to account and pay over the money, was an infant. The same was affirmed in the case of *Brown* v. *M'Call*, 3 Hill, 335. In *Gray* v. *Givens*, 2 Hill, Ch. R. 514, Judge Harper says, "I think it has not been questioned, that the time during which the party to be affected has been under disability, must be deducted in computing the lapse of time, in analogy to the Statute of Limitations. Such was the case in *Riddlehoover* v. *Kinard*, 1 Hill, Ch. R. 375. If the possession were taken in early infancy, the title might be matured before the infant arrived at age, and before the Statute of Limitations had begun to run against him. The decisions have been numerous, and the practice habitual, and I am not aware of

[1] Best on Presumps., p. 102 *et seq.*

any doctrine or decision to the contrary." We have no case involving the right to an easement, in which the question involved in this case has been decided by this court. In *Watt* v. *Trapp*, 2 Rich. 136, Judge O'Neall, on the circuit, expressed the opinion to the jury, that the presumption of a grant to a way would be arrested by infancy. But that point was not necessarily involved in the case, and this court declined to express any opinion, as, according to my recollection, it was not argued. In other States the question has been decided. In the case of *Watkins* v. *Peck*, 13 New Hamp. R. 360, it was held, that a grant cannot be presumed from the use and enjoyment of an easement for the term of twenty years, when the party, who must have made the grant if it existed, was an infant at the time of making it. This does not come up fully to the case under consideration, because in this case the grant, if any, must have been made coeval with the use, and that was in the lifetime of Cosnahan, who was adult. But that can make no difference, unless we apply the rule, which has been adopted in relation to some of the clauses of the Statute of Limitations, viz., that where the Statute begins to run, it will not be arrested by any intervening disability. But this has not been contended for, and there is no semblance of authority to support it. This construction arises on a positive enactment, that the action must be within four years from the time the right of action accrued; whereas presumptions arise from the assertion of the right, and the acquiescence in it, during the whole period of twenty years, and how can it be said that the infants have acquiesced, when they were incapable of asserting their rights?

But the case of *Melvin* v. *Whiting*, 13 Pick. R. 190, was a case of intervening infancy. The plaintiff claimed a title to a several fishery, on the defendant's soil, and relied, to support his title, on proof of an adverse, uninterrupted, and exclusive use and enjoyment for twenty years. The jury were instructed by the Chief Justice that, to raise such a presumption of conveyance, it must appear that such exclusive right had been used and enjoyed against those who were able in law to assert and enforce their rights, and to resist such adverse claim, if not well founded; and, therefore, if the persons against whom such adverse right is claimed, were under the disability of infancy, the time during which such disability continued, was to be deducted in the computation of the twenty years; and this construction was supported by the Court of Appeals. The only *dictum* which I have found to the contrary, is contained in the opinion of Judge Story, in the case of *Tyler* v. *Wilkinson*, 4 Mason, 402. The action involved the priority of right to use the water in Pawtucket River, and in no way involved the question of the rights of infants. The question which he was discussing was, whether the presumption from adverse use was a *presumptio juris et de jure*, a question of law to be decided by the court, or a fact to be determined by the jury. In support of his argument, that it is a *presumptio juris*, he says the right by presumption of a grant is not affected by the intervention of personal disabilities, such as infancy, coverture, and insanity.

This *dictum* is noticed and disregarded in the New Hampshire case above referred to, and I may be permitted to say, without any disrespect to that great and learned judge, that he did not bear in mind the distinction between a right claimed by prescription, and a presumption of right from a non-existing grant. The former requires a use beyond legal memory, the latter may arise within twenty years. Best on Presump. § 88; 3 Stark. Ev. 911, 3d ed.; 2 Ev. Poth. 139.

We are of opinion, that the period of time during which the infant heirs of Cosnahan were the owners of the servient tenement, is not to be computed as a part of the twenty years' adverse use necessary to vest the easement in the plaintiff, and upon this ground the plaintiff should have been nonsuited on the circuit. It is therefore ordered that the verdict be set aside, and the defendant have leave to enter up a judgment of nonsuit.

O'NEALL and FROST, JJ., concurred. *Motion granted.*

REIMER *v.* STUBER.

SUPREME COURT OF PENNSYLVANIA. 1853.

[*Reported* 20 *Pa.* 458.]

ERROR to the Common Pleas of Northampton County.

This was an action on the case brought by John Stuber against George Reimer, for obstructing a private way. In the first count of the declaration was set out the plaintiff's possession of a certain messuage and farm in Bethlehem township, Northampton county, and that by reason thereof he ought to have had, and still of right ought to have, a certain way from the said farm, through and along said farm, and through and along a certain close to the highway, leading from Schoener's church to Easton, by way of Santee's mill, thence to a certain other road leading through Noddletown, and from thence to Bethlehem, &c., and that the defendant had obstructed said way. In the second count the plaintiff's possession as above was alleged, describing the way as leading to a certain highway, and so back to plaintiff's farm, and the obstruction by the defendant was charged generally.

The defendant pleaded "Not guilty."

The case was tried at August Term, 1850, and a verdict rendered for the plaintiff, for $2.50 damages and six cents costs.

Stuber the plaintiff, and Clementina Innes, and Robert F. Innes, the minor children of Francis S. Innes, deceased, were owners of *adjacent* premises in Bethlehem township. C. and R. F. Innes inherited their property from their grandmother, Catharine Innes, who died in the year 1841, after the decease of their father, Francis S. Innes, who died June 27, 1839. Mrs. Innes inherited a large tract of land from her father.

She married when a minor, and survived her husband, who died in the year 1836.

After the decease of Catharine Innes, her real estate was divided by an action of partition, in which the tract adjoining Stuber was allotted to the minor children of Francis S. Innes, deceased.

After the partition, the woodland adjoining Stuber's was cleared and enclosed, the defendant, Reimer, *who was a tenant*, putting up the fences by direction of the guardian of C. and R. F. Innes, for the purposes of cultivation. This closed up the road which had previously been used through the same *while unenclosed woodland*.

The plaintiff below claimed that he had acquired a right of way by user for more than twenty-one years. This on the part of the defendant was denied: and whether the plaintiff had acquired such right or not, was the matter to be decided. On the part of the plaintiff a witness, C. Shimer, testified that he lived near to Stuber the plaintiff, and that Stuber had used the road in question for 30 years or more: that he used it for all purposes — he had no other road to get in and out from his land, that the witness knew. He used it as having a right to it, openly, unmolested, and peaceably. The neighbors used the road occasionally. Stuber had no other way to get out on the Schoener Church road on his own land.

Another witness testified that he was above 67 years old, and that as long as he remembered, from 30 to 33 years, the road existed. That he did not remember a time when the road did not exist. The woods were open, no fence around. He thought there was over 100 acres of woodland.

Another witness testified that he lived 1½ miles from Stuber, was acquainted with the road 40 or 45 years. Did not recollect when it was not there.

Another witness said that he went that way to church and to mill. That the people who lived in Noddletown went through the road.

Another witness testified that his father lived on the farm of Mrs. Innes, 26 years before the trial; that his father used the woodland, he had it with the farm.

There were seven bills of exceptions as to the rejection and admission of evidence, which are not here stated, as the specifications of error were overruled in this court, as each included two or more bills of exceptions or raised more than one question.

The eighth bill of exceptions was to the charge of the court. The charge was objected to, first, because it recognized, generally, the plaintiff's right to recover under the evidence in the case, and then, as to the special parts of it which are enclosed in brackets.

Jones, J., charged the jury as follows: "The plaintiff's claim to this way is founded, not upon a deed, for it is not produced here before you, but upon facts and circumstances from which he would have you draw a presumption of a grant of it, made 21 years and more before the obstruction of which he complains. In order to raise that presumption in

his favor, his enjoyment of this way, during that time, must have been openly and notoriously adverse to the owner of the land on which the way is claimed, and whether his enjoyment of it was so, is a question of fact for the jury.

"An occasional crossing of one's land, at long intervals, though it may be continued through 21 years, could not give rise to a presumption of this kind [nor yet is it necessary to cross it every day in order to ground it. If one crosses so frequently as to wear a road, and steadily use that road, whenever he pleases, apparently for all his necessary purposes, and that road is in effect necessary to his convenience and he continues to use it, uninterrupted by the owner of the land for 21 years, that would be a case in which a jury would be bound to presume a grant]. But a presumption founded on such evidence, might very readily be rebutted by other evidence.

"If in the case before you [the evidence of the plaintiff, considered by itself unanswered by the defendant's evidence, is strong enough to raise a presumption of grant of this way,] you will then consider the several circumstances upon which the defendant relies to rebut that presumption. If these circumstances, any one of them taken singly, or in connection with any or all the others, raise a doubt in your mind as to the enjoyment of the way by the plaintiff being open, notorious, hostile, continuing for 21 years against the owner of the land, the plaintiff cannot recover. [To rebut the plaintiff's case, the defendant relies on these facts, viz., that the owner of the land sought to be charged with the easement, lived at a distance from it, and visited it rarely; that the land over which the easement is claimed, is unenclosed woodland]; and that the plaintiff expressly disclaimed any right to this easement.

[" By itself, the first of these circumstances is not of any great weight. As to rights of way, presumptions are made against owners of land during the possession of their tenants.] With regard to the second [an easement may be acquired over unenclosed woodland; but it must be of a certain and definite way, not on one line this year, on another next year, just as accident or caprice may determine.] With regard to the disclaimer of right by the plaintiff, he would be absolutely concluded by that, if he made it understandingly, either of his right or of the language in which he was speaking."

It was assigned for error: 1. The court below erred in rejecting the evidence offered by the defendant, to show that Mrs. Innes, the reversioner, who resided in Easton, nine miles from the farm, was not in the habit of going there often to see its state and condition: that she was a minor when she married, and seldom visited the land in dispute, and never the woodland, as mentioned in the 1st and 2d bills of exceptions.

2. In rejecting the evidence offered to prove that the plaintiff declared that he had good backing, and that Conrad Shimer, who had been examined as a witness on the part of the plaintiff, told him "he could not help a man who would not take advice," as mentioned in the 3d, 4th, and 5th bills of exceptions.

3. In admitting, as rebutting evidence, the testimony offered by defendant, of conversations between Stuber and Reimer, and alleged admissions of the latter in regard to the road in dispute as mentioned in the 6th and 7th bills of exceptions.

4. The charge of the court is erroneous in those parts in which the judge, after saying that an occasional crossing of another's lands will not give rise to a presumption of grant, charged the jury as stated, specifying the parts of the charge within brackets.

Porter, for plaintiff in error.

Reeder, for defendant in error.

The opinion of the court was delivered, May 12, by

Black, C. J. This was an action for disturbing the plaintiff's right of way over land of which the defendant was in possession. The plaintiff's title to the way was founded on user for upwards of twenty-one years, and some evidence was given which showed that he had enjoyed it for more than forty-five years. The owner of the land was a woman; she died five years before suit brought; was married thirty-five years before her death; was a minor at the time of her marriage; had seldom visited the place, and never the woodland through which the way ran.

1. The mere inattention of the owner of land to the fact that an easement in it is used by another, does not weaken the force of the presumption which the lapse of time creates. Such presumptions, like the Statutes of Limitation, will work out their purpose though the party affected by them should close his eyes. It would not do to say that the mere ignorance of the owner repelled the presumption of a grant.

2. Where a tenant for years or for life grants an easement, such grant is of no force or validity against the reversioner or remainderman. So, if the tenant of a particular estate suffer an easement to be enjoyed for twenty-one years, it raises no presumption of a grant by him in remainder or reversion. But here the land was occupied by tenants from year to year. The owner of the fee was in possession, and had the right to bring suit every year. The case is wholly different from that of one who is out of possession during the whole of the time.

3. No presumption of a grant arises from the adverse enjoyment of an easement against a minor or *feme covert*. The presumption operates in strict analogy to the Statute of Limitations, which recognizes the disabilities of infancy and coverture as sufficient excuses for inaction. But a second disability added to one which existed when the adverse enjoyment first began is always disregarded. Thus, a coverture which took place during infancy is not taken into account after the infancy has ended. In this case the marriage of Mrs. Innes was forty-five years before suit brought. Her age is not given, but it would be absurd to say that she was not out of her minority more than twenty-one years before the suit; for that would require us to believe that she was not twenty-one years old until after she was twenty-four years married.

4. Another point is, whether one can acquire a right of way by user of *unenclosed woodland* for twenty-one years. This question was solemnly settled in *Worral* v. *Rhoads* (2 Wh. R. 427). Believing it to be our duty to leave the law in as good condition as we found it, we refuse to disturb that case, and therefore rule this point also against the plaintiff in error.

5. Our opinion is, that none of the exceptions to evidence can be sustained, for the reason that the ruling of the judge below was right. But, instead of discussing them at length, we will dismiss them at once, by saying that they are not set out in the paper-book as the rule of court requires.

Judgment affirmed.[1]

TRACY *v.* ATHERTON.

SUPREME COURT OF VERMONT. 1864.

[*Reported* 36 *Vt.* 503.]

TRESPASS on the freehold. Plea, the general issue and a special plea justifying the trespass under an alleged private right of way, and also a highway. Trial by jury, April Term, 1862, *Pierpoint*, J., presiding.

The testimony tended to show that one Penniman was the owner of a piece of land, adjoining the close described in the declaration, from some time prior to the year 1828, until June, 1854, when he sold and conveyed it to one Batchelder; that Batchelder sold and conveyed it to Barber, about the year 1858; and that at the time of the committing of the trespasses in question, the defendants were jointly occupying said land under a contract with Barber for its purchase. That prior to the year 1828, one Jones was the owner of the close mentioned in the declaration, and remained so until the 5th of November, 1833, when, with the knowledge of Penniman, he sold and conveyed it, by deed of warranty, to Griswold W. Tracy, the plaintiff's father, who continued to own and occupy it until the time of his decease, on the 7th of September, 1837. It did not appear that Penniman was present when the deed was executed, or that he knew that the conveyance was by deed of warranty. That at the decease of Griswold W. Tracy this close descended to the plaintiff as heir of Griswold W., and that he has ever since continued to be the owner of it. That at the time of the decease of Griswold W., the plaintiff was a minor, and remained so until the 27th of September, 1853, when he arrived at majority. That for many years prior to the year 1828, there was a public and open highway leading through the close described in the declaration, and through the land so owned by Penniman, which highway was discontinued and fenced up in the summer of 1828, and has so remained ever since. That at or about the time of the discontinuance of

[1] But see South Carolina cases cited, Wash. Eas. *92; and cf. *Hannibal* v. *Blake*, 102 Mass. 247 (1869), which "stands alone," *Ward* v. *Warren*, 82 N. Y. 265, 268.)

this highway, and as a part of the arrangement for throwing up the highway, Penniman having no other means of access to his land, it was orally agreed between Penniman and Jones, that if it was discontinued, Penniman should always have the privilege of passing from the main road to and from his land over the land of Jones, at the place where the highway then was, and in as ample a manner as he had before. That Penniman, his tenants and grantees, down to the time the Penniman lot passed to the defendants, were in the habit frequently, as they had occasion, of passing over the *locus in quo* with teams, cattle and sheep, without asking or obtaining permission and without any express assertion of a right so to do, but under a claim of right; and that they kept this way in repair.

It appeared that in October, 1837, Mrs. Sarah Tracy, plaintiff's mother, (who, from the time of the death of her husband, always lived with the plaintiff,) was appointed guardian of the plaintiff, and acted as such during his minority; and it also appeared that on the 24th of December, 1850, Penniman wrote and caused to be delivered to Mrs. Tracy, the following letter, to wit: —

December 24, 1850.

Mrs. Tracy — *Madam.* My men that are drawing wood, wish to go through your lots. If you will let them pass, I will pay you any reasonable sum you or your neighbors may say.

Respectfully, A. H. Penniman.

The testimony of Mrs. Tracy, who was called as a witness by the plaintiff, tended to show that she supposed, from the letter itself, that it had reference to the place where the highway formerly crossed the close mentioned in the declaration, and where Penniman and his tenant had been accustomed to pass. But Penniman testified that the letter referred to a different place, and that a different place was used on that occasion. The plaintiff's testimony further tended to show that soon after the conveyance by Penniman to Batchelder, the plaintiff gave permission to Barber, (who had the principal care of the Penniman lot for Batchelder while he owned it,) to take cattle and sheep across the plaintiff's land upon the application of Barber, and refused to grant any privilege to one of the defendants soon after they commenced occupying the Penniman lot.

The plaintiff's testimony further tended to prove that the defendants had driven their stock across the *locus in quo* daily previous to the commencement of this suit.

The defendants' evidence tended to show that their use, and that of those under whom they claimed, was always adverse, continuous, without license and under a claim of right, and applied to any species of use connected with the use of the farm.

The plaintiff requested the court to charge the jury (among other things,) that the infancy of the plaintiff, from the time he became the owner of the *locus in quo* until the 27th of September, 1853, would, if

the fact was found, operate as an interruption of the adverse uses of the way by Penniman, and that in determining the question of a prescriptive right to the easement claimed by the defendants, only the time which elapsed after the plaintiff's majority could be considered. Or that if such infancy did not wholly defeat the effect of the previous uses of the way by Penniman, the time during which the infancy existed should be deducted from the whole time of user, and that if after such deduction the adverse enjoyment of the way had not continued for fifteen years, no right could be presumed.

That every renewal of a license to pass across the plaintiff's land at the place in question; every application for such renewal, by the defendants or those preceding them in the chain of title to the Penniman lot; and every admission by the defendants or by their predecessors in the title to said lot, that the use of the way in question had been by the license, consent or indulgence of the owners of the servient close, would conclusively rebut the presumption of a grant; and that the previous enjoyment of such way had been under a claim of right, however long such previous enjoyment might have continued.

The court declined so to instruct the jury, except as follows: —

The court instructed the jury particularly as to what it was necessary for the defendant to prove, to establish in himself the right of way claimed; to which no exception was taken.

The court told the jury that if Penniman, while he owned the farm now owned by the defendant, and before the right of way had become established and vested in the owner of such farm, applied for and obtained a license from the owner or occupier of the Tracy lot, to pass over the place in question, such fact would prevent his acquiring a right of way by any subsequent user, and defeat the claim now set up by the defendant; and the same would be the case in respect to any other owner of said farm. But if the jury found that the right had become established and vested in the owner of said farm by such a use of the way, and for such a period as the court has told them was necessary, a subsequent application, by such owner, for leave to pass over the place in question, and a license given accordingly, would not divest the right and defeat the claim. But that in determining whether the right had become established, such an application, made after the lapse of the required period, would be an important matter for them to consider, in determining whether the use of the way had been of such a character as the court had told the jury was necessary to establish the right. That if Penniman, in his letter of the 24th of December, 1850, referred to a different place from the way in question, such an application would have no effect in this case, even though Mrs. Tracy supposed he referred to the place in question.

The plaintiff excepted to the refusal to charge as requested, and to the charge as above detailed.

M. L. Bennett and *E. R. Hard*, for the plaintiff.

George F. Edmunds and *J. French*, for the defendants.

POLAND, C. J. The great question in this case is, what effect the infancy of the plaintiff has upon the right of way claimed to have been acquired over the plaintiff's land, by the defendants and their predecessors in title, by prescription, or adverse possession for a period of more than fifteen years. It is now claimed that the jury should have been directed to find on the evidence whether the adverse use of the way began before the land descended to the plaintiff, and should have been instructed on the law of the case on the theory of finding that the adverse use began after the land descended to the plaintiff, and during his infancy. But it appears from the case that the testimony tended to show that the use of the way began as early as 1828, by Penniman, and under a claim of right, in pursuance of the agreement made when it was discontinued as a highway. It does not appear that any evidence was given tending to contradict this; indeed it rather appears that this commencement of the use was shown by the plaintiff's own evidence. None of the requests made by the plaintiff's counsel to the court point to any such state of the case, so that we can only consider this as one of those common efforts to raise a question in this court on exceptions, which was not made at all in the court below.

It must be taken, then, under the finding of the jury, that the use of the way began before the estate descended to the plaintiff, and that it was continued under a claim of right, and without interruption, for more than fifteen years; but that during this period the title came to the plaintiff, who was an infant, and so continued from 1837 to 1853; so that, if the plaintiff was right in his request, that the jury should be charged that only the time after the plaintiff became of age should be reckoned, there was nothing for the jury to consider, and if he was right in his request that the period of his nonage should be deducted, then the jury should have been directed to find whether the use of the way before, and after the disability, was sufficient to make the requisite period.

We understand the case to have been submitted to the jury on this ground: that if the adverse use of the way began during the life of the plaintiff's father, or his grantor, and was continued for the period of fifteen years, without interruption, the right was acquired, though before the expiration of the fifteen years the land over which the way was used, descended to the plaintiff, who was an infant.

The question arises on the correctness of this instruction. The Statute of Limitations does not extend to these incorporeal rights, but it has now become universally settled that an uninterrupted use of a way or other easement, under a claim of right, for the period of time fixed by the Statute as a bar to the recovery of lands held adversely, gives the person so using it a full and absolute right to such easement, as much as if granted to him. This has been settled by a long course of judicial decisions, and is founded primarily on the ancient doctrine of prescriptions, but has finally by the courts been made to conform, by analogy, to the Statute of Limitations applicable to lands, in all

substantial particulars, so far as the difference in the subjects will allow.

The general language of the books, found in innumerable cases, is that from such a possession, continued for the period of the Statute, the law will presume a grant, or courts will direct juries to presume a grant. But this is purely a legal fiction. The doctrine proceeds wholly upon the ground of presuming a right after such length of possession, and not at all upon the ground that there ever was a grant made, but which has been lost, and though it may be shown ever so clearly that no grant was ever made, the case is not at all varied.

A great deal of learning has been expended upon the question whether, in such case, the presumption arising from the length of possession is a presumption of law, or one of fact, and all the cases on the subject have been industriously brought to our attention in the argument of this case.

The counsel for the plaintiff say that this presumption of a grant from such long possession is a presumption of fact, to be found by a jury from such possession, unless rebutted, and that therefore any evidence which tends to show that no such grant was made, or could have been made, is admissible, and should be submitted to the jury. If it were true that such was the real ground upon which these rights are sustained, the view of the counsel would be unanswerable. But the counsel themselves do not claim that this grant which is presumed is anything but mere fiction. The true view of the subject is well stated by Wilde, J., in *Coolidge* v. *Learned*, 8 Pick. 504. He says: "It has long been settled, that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury a duty to presume a grant, and in all cases juries are so instructed by the court. Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession should not be disturbed."

It is said in many of the cases that this length of possession is only evidence to be submitted to the jury. If by this is meant, that where it is conceded or proved that there has been an uninterrupted possession under claim of right for the requisite time, and this is not encountered by any evidence to rebut the legal effect of it, that it is a proper question to be submitted to the jury to say whether this gives a right, or not, it is not in our opinion correct.

If there be any conflict of evidence as to the length, or character of the case, or any evidence proper to rebut the acquiring the right, it then becomes proper to submit it to the jury. But where it stands solely upon the conceded or proved possession under claim of right for the requisite time, it is never submitted to a jury to find the right established or not, according to their judgments. And whether it is more proper for the court to tell the jury that it is their duty from this

to presume a grant, or to tell the jury that from this the law presumes a grant, is mere idle speculation. In fact, and in substance, it is a verdict directed by the court, as a matter of law. And if it were submitted to the jury, and they were to return a verdict against the right, no court would ever accept the verdict.

Mr. Washburn, who reviews all the decisions on the question whether the presumption to be drawn from possession or use of an easement for the required time, is one of law, or one of fact, and who gives the weight of his opinion in favor of its being a presumption of fact for the jury, after all, says: "It may, therefore, be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water, for instance, in a particular way, for more than twenty-one, or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it." Wash. on Eas. &c. 70.

In the case of *Townsend* v. *Downer*, 32 Vt. 183, Aldis, J., in giving the judgment of the court, says: "When from long possession, with or without auxiliary circumstances, a grant is presumed as *matter of law*, and without regard to the fact whether such a grant was really made or not, then it may with the strictest propriety be said that the law presumes a grant. In such a case, under the practice in this State, it would be the duty of the court to direct a verdict."

He then proceeds to speak of the class of cases where lapse of time and long possession is relied on with other circumstances, as evidence to establish that a grant has been made in *fact*. The opinion then proceeds: "We do not understand that there is still a third class of cases in which, although the grant is not presumed by the court as pure matter of law, and is not found by the jury as a fact, still the court may direct the jury to presume a grant, and thus by the intervention of the jury, but without the exercise of their judgment upon the evidence, establish the grant as if it were a mere inference of the law. Language may be found in some books and decisions favoring such a view, but the doctrine is clearly against the whole current of English and American decisions, and tends to confound the proper and separate jurisdictions of court and jury. This erroneous view, we think, has arisen from the want of precision in language, when treating of presumptive evidence and the grants proved by or presumed from it."

We think therefore, that in substance the presumption arising from such long-continued possession, unrebutted, is a presumption of *law*, and that it is conclusive evidence, or sufficient evidence to warrant the court in holding that it confers a right on the possessor to the extent of his use.

But it does not in our opinion go very far in determining the question in this case, whether the presumption arising from the length

of possession is one of law, or one of fact, for whichever it may be it is liable to be rebutted in various ways. It may be shown to have originated or continued by leave of the owner; that it has not been under a claim of right, or not continuous; or that it has been interrupted by the owner of the land, and whenever any evidence is introduced tending to invalidate the right claimed, on any of these grounds, that the case becomes a proper one to submit to the jury.

But all authorities concur in saying that this doctrine has been adopted and rests upon its analogy to the Statute of Limitations applicable to lands, and both parties in the present case agree that the effect of the plaintiff's disability upon the right claimed by the defendants, is precisely the same that it would be upon lands of the plaintiff holden adversely by the defendants, and their predecessors in title, during the same period. And in our judgment rights to easements acquired by long possession ought to stand on the same ground as rights by possession in lands. The real principle underlying the right, is the same precisely on which the Statute of Limitations stands. In the first place, it is presumed that one man would not quietly submit to have another use and enjoy his property for so great a length of time unless there existed some good reason for his doing so, and that after allowing it for so long, he should not call upon him to show his right or title, when it may not be in his power to do so; and in the second place, it is a rule of policy, adopted in support of long and uninterrupted possession. It is important too in another view, that the doctrine of the law in the two cases should harmonize, that the people may not be misled and perplexed by having the law different ways upon subjects which in reason and upon principle should be the same.

The requisites of a possession by which an easement is acquired, as generally laid down in the books are, that it should be adverse, under a claim of right, exclusive, continuous and uninterrupted. These are exactly the requisites of a possession of lands to give a title under the Statute of Limitations against the proprietor. But it is sometimes said that the possession must be with the acquiescence of the owner. But this is the same as saying that the possession must be *uninterrupted*. If the owner does not interrupt the possession in any way, he does acquiesce as far as is needful in order to make the possession effectual against him. In the case of lands which are wholly in the possession of a disseisor, in order to make an effectual interruption of the possession, the owner must actually make an entry on the land for that purpose. In *Powell* v. *Bagg*, 8 Gray, 441, it was decided, that where the owner of the land, over which another had laid an aqueduct, and claimed to have acquired a right by possession upon the land, forbid the owner of the aqueduct from entering upon the land to use the aqueduct, this was such an interruption of the use as prevented the acquirement of an easement right. The owner of the land, being already in possession, could not make an entry to stop the

effect of the user, or possession, and his act on the land, of forbidding the other to enter and use the aqueduct, was all he could do to prevent him unless he resorted to force, and ordinarily the law does not require one to use force to assert his rights.

In the case of an entry on land to interrupt the acquiring a right by a disseisor, the owner is not required to use force in order to give legal effect to his entry.

It is not necessary to determine whether such an interruption as was shown in *Powell* v. *Bragg* would be sufficient to stop the effect of a previous use toward acquiring a right by prescription, but the decision is founded apparently on a sound distinction between an actual adverse possession of lands, and a mere easement upon lands, of which the owner himself is in the actual possession.

Under the English Statute of Limitations, passed as early as the reign of James I., it was uniformly held that disabilities, in order to prevent the operation of the Statute, must exist at the time the right first accrued.

This Statute of James has been the foundation of similar Statutes in this country generally, and though its precise language has hardly ever been adopted, still, the same construction has been generally followed by American courts. The only instance of so wide a departure from the English Statute as to induce a different construction in this respect is in the State of Kentucky. But the saving in the Kentucky Statute is in favor of those "who are or shall be infants, &c., at the time when the said right or title accrues or comes *to them*." The counsel for the plaintiff claim that our Statute of Limitations of 1797 varies so widely from the English as to require a different construction in this respect, and one similar to that given by the Kentucky court to theirs.

The Act of 1797 limits rights of entry into lands, and actions for the recovery of lands, to fifteen years next after the right shall accrue to the plaintiff or those under whom he claims. Sect. 10 provides, generally, that it shall not apply to infants, etc., but they shall be allowed to sue within fifteen years after the removal of the disability. It does not say, in terms, that the rights of those disabled when the right *first* accrued shall be saved, as does the English Statute. Neither does it, in terms, save the rights of those who shall be infants, &c., when the right accrues or comes *to them*.

But the question cannot be regarded as an open one in this State. In *McFarland, Adm'r of Burdick*, v. *Stone*, 17 Vt. 174, the question came before the court. The action was ejectment to recover lands of which Burdick died seised. The defendant had been in possession more than fifteen years before suit brought claiming title. The plaintiff claimed to avoid the Statute on the ground of the disability of the heirs. Two of the heirs were infants at the decease of their father, and fifteen years had not elapsed after they became of age before the suit was brought, and the plaintiff was allowed to recover for their

shares of the land. Two other female heirs were infants when the defendant entered upon the land, and before they became of age were married, and so continued till suit brought, so that they had been constantly under disability during the whole period of defendant's possession. The Statute had not run in favor of defendant when the disability of coverture intervened, but more than fifteen years had run after they became of age, before suit brought.

It was decided that their rights were bound by the Statute, and the court held that our Statute should have the same construction as the English, and that no disabilities could be regarded as within the saving, except such as existed at the time the right *first accrued*. If the plaintiff's claim is well founded, that the intervening of a disability, before the Statute has run, arrests it, and entitles the party to fifteen years longer after the disability is removed to sue, then the plaintiff should have recovered the shares of the two female heirs. They could not be in a worse condition after the disability of coverture arose, in consequence of having been all the previous time under the disability of infancy, than they would have been, if before the coverture they had been legally competent to sue, or the right had been in some one else who was competent. The real point in the case was the same made here, viz.: Must disabilities, in order to be within the saving of the Statute, exist when the right first accrues? — and was fully decided. It was stated in argument by Judge Bennett, that the Statute of 1797 was always understood by the courts, and men of eminence in the legal profession in the State, to be different from the Statute of James in this respect. Judge Bennett's long experience at the bar and upon the bench, entitles his statement to great consideration, but the strictest search has not enabled us to find any trace of such an opinion in our reports, and the case of *McFarland* v. *Stone*, where the contrary was decided, was tried by Judge Bennett, and his ruling was affirmed in the Supreme Court. So far as we have any knowledge of professional tradition on the subject, the general understanding has been that when the Statute of Limitations once began to run, no subsequent intervening disability would arrest it.

Our present Statute of Limitations is made to conform exactly to the English, by confining the saving of disabilities to such as exist at the time the cause of action accrues, but no one has ever supposed that the law in this respect was changed from what it was under the Act of 1797. Indeed the change of phraseology has been made by revisers, and for the purpose of making the language more exactly express the meaning as judicially determined.

The decisions in relation to the Statute applying to personal actions are all in the same direction. *Hill* v. *Jackson*, 12 Vt. We are satisfied therefore, that by the settled construction of the Statute of Limitations, a disability in order to prevent the operation of the Statute must exist when the right *first accrues*, and if the analogy of the Statute in this respect is to be followed, it must govern this case. And we see

no reason why it should not be in this particular, if in any, as it stands upon the same reason and is governed by the same policy.

The cases that have been cited bearing upon this particular point are contradictory, and no uniform principle seems to have been followed in deciding them. *Melvin* v. *Whiting*, 13 Pick. 134, is cited by the plaintiff. It was an action for disturbing the plaintiff's fishery. The plaintiff claimed a right to the fishing by long-continued use or prescription. It appeared that after plaintiff's possession commenced, the title under which defendant claimed, became vested in some infant heirs. It was held that the period of minority should be deducted, but as the plaintiff's possession, before the commencement, and after the expiration of the disability, added together, made the requisite length, according to the Statute of Massachusetts, the plaintiff's right was held to be established, and he was allowed to recover. The case seems to have been very little examined by court or counsel, no reasons are given, or authorities cited.

Watkins v. *Peck et al.*, 13 N. H. 360, is also cited by plaintiff.

This was a case in chancery, involving in controversy the right to draw water by aqueduct from a spring. In this case also, during the use from which the right was claimed, the title had descended to minor heirs, and it was held that this interrupted the prescription. Judge Parker, who gave the opinion, says that such a right by long possession rests upon the presumption of a lost grant, and that it would be absurd to presume a grant, where it was clear that no such grant could have existed.

It would almost seem that the distinction between the class of cases where the question is whether there has been a *grant* or *deed in fact*, and those where this presumption is a *mere legal fiction*, was not perfectly clear to so eminent a judge as Judge Parker.

Lamb v. *Crosland*, 4 Rich. S. C. 536, is also cited by Prof. Washburn, as supporting the same doctrine, but I have not seen the case.

On the other hand the case of *Reimer* v. *Stuber*, 20 Penn. St. 458, where a right of way was claimed by prescription, and sought to be avoided on the ground of disability, the use began during the minority of the owner of the land, and who before she became of age was married, it was held that the time began to run when she became of age, notwithstanding the subsequent disability of coverture. If the case stood really upon the ground of a presumed grant, and it could not be presumed because the owner was under a disability, and could not make a grant, it must extend through both disabilities. The case can stand only upon the analogy of the Statute. In that view it is clearly correct.

Milburn v. *Patrick*, 1 Jones N. C. 23, was a claim by the plaintiff that he had acquired a right of way by use. After the use began the owner of the servient estate became insane. It was decided that as the disability did not exist at the time of the commencement of the plaintiff's adverse use, it did not prevent the use ripening into a right.

The court say, "Such being the law as to the Statute of Limitations, it follows it must be so, in regard to prescriptions also." The language of Judge Story in *Tyler* v. *Wilkinson*, 4 Mason, 402, in this respect goes even beyond what we are disposed to hold, indeed disabilities coming clearly within the saving of the Statute, would not avoid a prescription, according to the most general interpretation of his language. But doubtless it was not intended by him to bear so broad a meaning. Prof. Washburn in his treatise on Easements says, "Perhaps the difference in the provisions of the Statutes of Limitations in the different States, may account for the discrepancy in the decided cases." But they can hardly be reconciled on such a basis. In both Massachusetts and New Hampshire, it is fully settled, that under their Statutes of Limitations no disability avoids their operation, unless it exist at the time the right *first accrues*. The decisions in those States must have been made in entire disregard of the analogy of the Statute in this respect, and we think they were made by giving undue importance to the fictitious theory of a lost grant.

The cases opposed to them are in our judgment founded upon much sounder legal reason, and we are disposed to follow the Pennsylvania and North Carolina cases, rather than those nearer home.

This disposes of the principal questions made in the case. The plaintiff claims there was error in the charge in another respect; that if they found the right of way claimed by the defendants fully established by the evidence as to the length and character of the use, any subsequent application for, and obtaining license to use it from the plaintiff, would not divest them of the right. Such subsequent application for license would be very powerful evidence to show that the previous use was not under a claim of right, so as to give a title, but no claim is made but that as evidence, it was given all the force it was entitled to.

But the plaintiff claims that it should have the effect of an estoppel, and prevent the defendants from setting up the right of way they had obtained by the previous use. The claim is put upon the same ground as that of a tenancy, where if a tenant has been admitted into possession by the landlord, he is estopped to deny his title. But we fail to see the analogy, or any good ground upon which an estoppel could be founded. The charge proceeded on the basis that the jury had already found the right of way completely established. The right of the defendants then was the same as if they actually held a conveyance of the right from the plaintiff. In such case it would seem singular that a parol admission of the plaintiff's right, or rather the defendants' want of right, should operate really as a reconveyance of a vested legal right in realty, which cannot be conveyed by parol. We think it can be regarded merely as an admission to be weighed against the defendants and as such the defendants had the full benefit of it.

The only remaining point is the instructions as to the Penniman letter. The letter appears to have been introduced merely as an

admission by Penniman of the title of the plaintiff, and his own want of title to any way over the plaintiff's land, by his asking permission to cross. If the letter referred to the way in question, it would be important evidence against his right. If it had reference to another place, and not to this, there it was no admission at all against his right to use this way. If the jury found that the letter referred to the way in question, it does not appear that the plaintiff did not have all the advantage he was entitled to from it, and if they found it referred to another place, and not this, then it was entitled to no force at all as an admission. It does not appear to us material how Mrs. Tracy understood the letter, considered in this light. If it was claimed that by her misunderstanding of the letter, and supposition that it referred to this way, she had conducted differently, and had allowed Penniman to use this way, supposing he was acting under the license obtained in answer to the letter, or omitted to put a stop to his use of it, supposing he acknowledged her right, or that of her son, then her misunderstanding of the letter might be important as explaining her own action. But nothing of this kind appears in the case. The letter was used to show that Penniman asked leave of Mrs. Tracy to use this way, thus acknowledging her right, and his own want of right. If he was speaking in the letter of another place, it was no acknowledgment at all as to this way, even if Mrs. Tracy by mistake supposed it was. We find no error, and the judgment is affirmed.[1]

LEHIGH VALLEY RAILROAD COMPANY *v.* McFARLAN.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1881.

[*Reported* 43 *N. J. L.* 605.]

ON error to the Supreme Court.

For the plaintiffs in error, *T. N. McCarter* and *F. T. Frelinghuysen*.

For the defendants in error, *H. C. Pitney* and *B. Gummere*.

The opinion of the court was delivered by

DEPUE, J. The defendant is the lessee of the Morris Canal and Banking Company. In 1871 the property, works, and franchises of the latter company were granted to the defendant by a perpetual lease, under the authority of an Act of the legislature. Pamph. L. 1871, p. 444.

The lessor was incorporated in 1824, for the purpose of constructing a canal to unite the River Delaware, near Easton, with the tide waters of the Passaic. Pamph. L. 1824, p. 158. The canal was constructed from the Delaware to the Passaic about 1830. In 1845 it was enlarged

[1] See *accord.*, *Wallace* v. *Fletcher*, 30 N. H. 434 (1855); and cf. *Ellis* v. *Marshall*, 10 All. 557.

throughout its entire length, to provide for navigation with boats of greater capacity. In 1857 the company renewed the timbers in its dam across the Rockaway River, and placed new flash boards upon it. In 1875 the flash boards were replaced by timbers firmly spiked on the top of the dam, and made part of its permanent structure.

The plaintiff is the owner of a mill situate on the Rockaway River, above the site of the dam. He complains of an injury to his mill by back water cast back upon it by means of the dam. The damages claimed are such as accrued between the 30th of December, 1876, and the 22d of September, 1877. As his declaration was originally framed, the theory of his action was that the dam at its increased height was an unlawful structure. At the trial the declaration was so amended as to present a claim for compensation for the damages sustained by the plaintiff between the days named, conceding that the canal company by its charter had power to take and appropriate to its use, lands and water, without compensation first made, and that therefore the dam was not, in itself, an unlawful structure.

[The learned judge first considered the question of compensation, and came to the conclusion that the plaintiff was entitled to it. He then continued: —]

The defendant also contended at the trial that the right to maintain its dam at its present height had been acquired by adverse enjoyment. If the defendant, or the canal company, under whom it claims, has acquired the right in dispute by prescription, the subject already discussed becomes of no importance in this litigation. It will be necessary, therefore, to examine the instructions of the judge on this head.

The instruction was, in substance and effect, that mere verbal protests and denial of the right, without any interruption or obstruction in fact, of the enjoyment of the right, would prevent the acquisition of an easement by adverse user. This instruction follows the opinion of the Vice-Chancellor, in *Lehigh Valley Railroad Company* v. *McFarlan*, 3 Stew. 180.

At common law there was no fixed period of prescription. Rights were acquired by prescription only when the possession or enjoyment was "time whereof the memory of man ran not to the contrary." By 20 Hen. III., *c.* 8, the limitation in writs of right dated from the reign of Henry II. By 3 Ed. I., *c.* 39, the limitation was fixed from the reign of Richard I. By 21 Jac. I., *c.* 16, the time for bringing possessory actions was limited to twenty years after the right accrued. These Statutes applied only to actions for the recovery of land; none of them embraced actions in which the right to an incorporeal hereditament was involved. But by judicial construction an adverse user of an easement for the period mentioned in the Statutes, as they were passed from time to time, became evidence of a prescriptive right; and finally, the fiction was invented of a lost grant, presumed from such user to have once been in existence and to have become lost. The fiction of a lost grant seems to have been devised after the Statute of James. It was called

a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring profert. Allegation of the loss of the grant excused profert and bringing the instrument into court.

Whatever strictures may have been made upon this method of judicial legislation, the fiction has been promotive of beneficial results, and forms the basis of prescriptive titles, and it is now too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority. *Angus* v. *Dalton*, 4 Q. B. D. 161, *per* Thesiger, L. J.

At a very early period it was held that when by the Statute of Limitations the seisin in a writ of right was limited to the time of Richard I., although a man might prove to the contrary of a thing whereof the prescription was made, yet this should not destroy the prescription if the proof was of a thing before the said time of limitation. 2 Roll. Abr. 269; 17 Vin. Abr. 272, "Prescription," M. Afterwards, when the fiction of a lost grant was devised, there arose considerable diversity and fluctuation in judicial opinions as to whether an uninterrupted user for the period of limitation conferred a legal right or raised merely a presumption of title which would stand good until the presumption was overcome by evidence which negatived, in the judgment of juries, the existence of a grant. This state of the law produced great insecurity to titles by prescription, and subjected such rights to the whim and caprice of juries. This evil was remedied by the later English authorities, which gave to the presumption of title arising from an uninterrupted enjoyment of twenty years the most unshaken stability, and made it conclusive evidence of a right. 3 Kent, 445. The judicial expression of opinion in England nearest to the time of the separation of the colonies from the mother country, is that of Lord Mansfield, in Cowper, 215, where he says that effect is given to the presumption, "not that in such cases the court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record, but they presume the fact for the purpose and from the principle of quieting the possession." The question has been set at rest in England by the Statute 2 and 3 William IV. But no one can examine the English cases for half a century preceding the Statute, without observing that the Statute in its main features was simply declarative of the law as expressed by the great weight of judicial opinions.

In this country the prevailing doctrine is, that an exclusive and uninterrupted enjoyment for twenty years creates a presumption, *juris et de jure*, and is conclusive evidence of title whenever, by possibility, a right may be acquired by grant.

In the class of legal presumptions established by judicial decisions

which have become part of the common law of the land, and are imperative rules of law against the operation of which no averment or evidence is received. Prof. Greenleaf classes the presumption of a grant arising from an exclusive and uninterrupted enjoyment for the period of prescription. 1 Greenl. Ev., § 17. He also says that, by the weight of authority, as well as the preponderance of opinion, it may be stated as the general rule of the American law, that an enjoyment of an incorporeal hereditament, adverse, exclusive, and uninterrupted for twenty years, affords a conclusive presumption of a grant or a right, as the case may be, which is to be applied as a *presumptio juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law. 2 Greenl. Ev., § 539. This passage is quoted and adopted by another distinguished writer on American law, as a correct exposition of the law on the subject. 2 Washb. on Real Prop. 449. This doctrine has the support of Mr. Justice Story, in *Tyler* v. *Wilkinson*, 4 Mason, 397, and is approved and enforced by Justices Wilde and Putnam, in the two leading cases of *Coolidge* v. *Learned*, 8 Pick. 503, and *Sargeant* v. *Ballard*, 9 Id. 251.

The difference between the English law, in the state it had reached before the Statute 2 and 3 William IV., and the American law, is slight. In England the presumption was dealt with as a presumption of fact; but for all practical purposes, it was a legal presumption, as it depended on pure legal rules. *Coolidge* v. *Learned*, *per* Putnam, J. Though the evidence of enjoyment was, in theory, presumptive evidence only of prescription, yet it was, in practice and effect, conclusive. Gale on Eas. (9th) 149. At last the English Court of Appeals held that the presumption arising from the uninterrupted enjoyment of an easement, operated as an estoppel by conduct, not conclusive, so far as to exclude denial or explanation of the conduct, but a bar to any simple denial of the fact, which is a mere legal inference drawn from such conduct; and consequently that the circumstance that no grant of the easement had been made was not material. *Angus* v. *Dalton*, 4 Q. B. D. 162.

In this State the law may be considered as settled in accordance with the prevailing doctrine in the courts of this country. In *Campbell* v. *Smith*, 3 Halst. 143, Chief Justice Ewing, speaking of a right acquired by adverse user, says: "Statutes of Limitation prescribing the time within which an entry shall be made into lands, tenements, or hereditaments, and within which every real, possessory, ancestral, mixed, or other action for any lands, tenements, or hereditaments shall be brought, are not deemed to comprehend in terms, and within their purview, the right now under consideration; but, upon the wise principle of such Statutes, and in analogy to them, to quiet men's possession, and to put an end and fix a limit to strife, a rule is established that, after the lapse of the period mentioned in those Statutes, a grant will be presumed, not, says Lord Mansfield (*Eldridge* v. *Knott*, Cowper, 214), that in such cases the court really thinks a grant has been made, but they presume the fact for the purpose of and from a principle of quieting the

possession. The period of twenty years is settled in England, according with the time mentioned in the Statute of 21 Jac. I. Our Statute prescribing a like period, our rule is the same." This passage was quoted by Chancellor Vroom, in *Shreve* v. *Voorhees*, 2 Green's Ch. 32, as a correct expression of the law of New Jersey. The same principle was adopted by Chancellor Pennington, in *Shields* v. *Arndt*, 3 Green's Ch. 247; by Chancellor Zabriskie, in *Carlisle* v. *Cooper*, 4 C. E. Green, 259; and by the Supreme Court, in *Wood* v. *Hurd*, 5 Vroom, 87. In the case last cited, Mr. Justice Van Syckel, in discussing the kindred subject of a dedication to the public acquired by user, says that "mere acquiescence for twenty years, unaccompanied by any act which repels the presumption of such intention" (to dedicate) "is conclusive evidence of abandonment to the public."

The owner of the servient tenement cannot overcome the presumption of right arising from an uninterrupted user of twenty years, by proof that no grant was in fact made. He may rebut the presumption by contradicting or explaining the facts upon which it rests; but he cannot overcome it by proof in denial of a grant. He may show that the right claimed is one that could not be granted away, or that the owner of the servient tenement was legally incapable of making, or the owner of the dominant tenement incapable of receiving such a grant. *Rochdale Canal* v. *Radcliffe*, 18 Q. B. 287; *Ellicll* v. *Birmingham Canal*, 3 H. of L. 812; *Staffordshire Canal* v. *Birmingham Canal*, L. R. 1 H. of L. 254; *Thorpe* v. *Corwin*, Spenc. 312. He may explain the user or enjoyment by showing that it was under permission asked and granted; or that it was secret and without means of knowledge on his part; or that the user was such as to be neither physically capable of prevention nor actionable. *Chasemore* v. *Richards*, 7 H. of L. Cas. 349; *Webb* v. *Bird*, 13 C. B. N. S. 841; s. c. 10 C. B. N. S. 268; *Sturges* v. *Bridgman*, 11 Ch. Div. 852. But if there be neither legal incompetency nor physical incapacity, and the user be open and notorious, and be such as to be actionable or capable of prevention by the servient owner, he can only defeat the acquisition of the right on the ground that the user was contentious, or the continuity of the enjoyment was interrupted during the period of prescription.

In defining title by prescription, Sir Edward Coke says, both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage and time. Possession must have these qualities: It must be long, continual, and peaceable; long, that is, during the time defined by law; continuous, that is, that it may not have been lawfully interrupted; peaceable, because if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. Co. Lit. 113 b. By a long course of decision, the word "interrupted," when applied to acts done by the servient owner, has received a fixed meaning as indicating an obstruction to the use of the easement, some act of interference with its enjoyment, which, if unjustifiable, would be an actionable wrong. This

meaning has been given to the word as used in the Statute 2 and 3 William IV. (Parke, B., in *Oluey* v. *Gardner*, 4 M. & W. 495), and is its usual signification.

Sir Edward Coke gives no illustration of what was meant by contentious, except "opposition on good grounds," and by a quotation from Bracton, who wrote in a primitive era of English law, before the doctrine of prescription, as applied to incorporeal hereditaments, had been subjected to the formative processes of judicial expositions from which the present state of the law is derived. The expression "opposition on good grounds" implies an act which would afford an opportunity to submit its validity to the test of judicial decision, and is more consistent with the idea of an interference with the enjoyment of the right, such as would give the owner ability to go into court and establish his right, than with the supposition that prescriptive rights should be forever kept in abeyance by acts which gave persons claiming them, no power by suit at law to establish the right. In the passage quoted by Coke from Bracton, this early writer says: "I use the term peaceable, because if it be contentious, it will be the same as before, if the contention has been just; as if the true lord forthwith, when the intruder or disseisor has entered into seisin, endeavors soon and without delay (if he should be present, or if absent when he shall have returned) to repel and expel such persons by violence, although he cannot carry out to its effect what he has commenced, provided, however, when he fails he is diligent in requesting and in pursuing." Bract., fols. 51, 52. Mr. Goddard, in discussing an enjoyment which is not peaceable, defines *vi* in the phrase *vi, clam aut precario*, to mean violence or force and strife, or contention of any kind; and the illustration he gives is where the enjoyment has been during a period of litigation about the right claimed, or the user has been continually interrupted by physical obstacles placed with a view of rendering user impracticable. Goddard on Eas. 172. In the English cases, peacefulness and acquiescence (when the servient owner knows or might have known that a right is claimed against his interest) are used indifferently as equivalent to uninterrupted.

In this country several decisions have been referred to as holding that prohibitions, remonstrances, and denials of the right by the owner of the servient tenement, unaccompanied by any act of interference with the enjoyment of the easement, will prevent the acquisition of the right. These cases are a legitimate outcome of the doctrine that the presumption is not a presumption *juris et de jure*, but is a presumption merely, liable to be rebutted by the proof of circumstances overcoming the presumption of a grant. This doctrine is supposed to have its chief support in *Powell* v. *Bagg*, 8 Gray, 441.

In *Powell* v. *Bagg*, proof that the owner, when on the land, forbade the party claiming an easement of the flow of water over his premises to enter, and ordered him off, while there for the purpose of repairing the aqueduct, was adjudged to be competent evidence of

an interruption, and an instruction that words, however strongly denying the right claimed or forbidding its exercise unaccompanied by any act or deed, was not an interruption of the user or enjoyment, was held to be defective and tended to mislead the jury. The evidence before the trial court is not fully reported. Evidence that the owner of the land forbade the other party to enter, and ordered him off," was undoubtedly competent as part of the plaintiff's case. Whether what occurred at that time would amount to an interruption of the easement, would depend upon circumstances, upon the conduct of the party when forbidden to enter or when ordered off. If the owner of the servient tenement, being on the premises, forbids the owner of the easement to enter for the purpose of enjoying it, and orders him off, and the latter, on a well-grounded apprehension that the former means to enforce obedience to his commands, desists and withdraws, an action on the case for disturbance of the right would lie. This view must have been present in the mind of the court, else why restrict the prohibition to place — on the land? To give certainty to the owner's purpose? A prohibition delivered elsewhere might be so vehement and emphatic as to leave the denial of the right equally beyond a doubt. On any other view of the case, as was said in *C. & N. W. R. R. Co.* v. *Hoag*, 90 Ill. 340, "the circumstances of the place where the forbiddance was made, whether on or off the land, would be immaterial." If facts such as are above indicated appeared in the case, the charge was, in the language of the court, "defective, and tended to mislead the jury in applying the evidence to the rule of law upon which the title of the defendant to the easement rested." Certain expressions from the opinion have been quoted as indicating that a verbal denial of the right will operate, *ipso facto*, to determine the right. If that view be adopted, or the suggestion of Mr Justice Woodbury (*Stillman* v. *White Rock Mf'g Co.*, 3 Woodb. & M. 551), that complaints and the taking of counsel against such encroachments will bar the right, be followed, it is obvious that rights by prescription will be of little value.

None of the authorities cited by the learned judge in *Powell* v. *Bagg* goes to the extent contended for. The passage quoted from Bracton, that an easement will be acquired by its exercise under a claim of right *per patientiam veri domini qui scivit et non prohibuit sed permisit de consensu tacito*, is followed by the comment that sufferance is taken for consent, and that if the lord of the property, through sufferance, has, when present and knowing the fact, allowed his neighbor to enjoy on his estate a servitude for a long time peaceably and without interruption from such enjoyment and sufferance, there is a presumption of consent and willingness. Bract., lib. 2, *c.* 23, § 1. In the passage referred to in Greenleaf, the language is that the user must be adverse — that is, under a claim of title — with the knowledge and acquiescence of the owner of the land, and uninterrupted. 2 Greenl. Ev., § 539. In *Sargeant* v. *Ballard*, 9 Pick. 254, 255, Wilde, J., in discussing the methods by which a claim of title by prescription may be controverted by dis-

proving the qualities and ingredients of such a title, says that "evidence might be given to prove that the use had been interrupted, thereby disproving a continued acquiescence of the owner for twenty years." In *Arnold* v. *Stevens*, 24 Pick. 112, the plaintiffs' claim was of a right to dig ore under a grant by deed. They had not exercised the right for forty years. In the mean time the owner had occupied and cultivated the surface of the land. The court held that there was no enjoyment hostile to the easement, for the owner of the land had done "nothing adverse to the rights of the owners of the easement — nothing to which they could object, or which would apprise them of the existence of any hostile claim, and no acquiescence, therefore, existed from which a conveyance could be presumed." In *Monmouthshire Canal Co.* v. *Harford*, 1 C. M. & R. 614, evidence was given of applications made on behalf of the claimants of the easement for permission to exercise the right. The court held that permission asked for and received was admissible to show that the enjoyment was not of right nor continuous and uninterrupted, for "every time the occupiers asked for leave they admitted that the former license had expired, and that the continuance of the enjoyment was broken." In neither of these cases was the effect of verbal remonstrances or complaints, as evidence of an interruption of enjoyment, considered.

Nor do the additional English cases cited by plaintiff's counsel in his brief meet the point under consideration. In *Liveit* v. *Wilson*, 3 Bing. 115, it is stated in the report that "as to undisputed use of the way there was conflicting testimony, but the weight of the evidence showed that the alleged right had been pretty constantly contested, and the defendant, upon recently taking some adjoining premises, the approach to which by the entrance he claimed into the yard, said "my right of way from the street to the yard can *now* no longer be resisted." The character of the acts of resistance does not appear in the report of the case, either in 3 Bing. or in 10 Moore — whether they were verbal complaints or physical resistance. I do not find in either report of the case any warrant for the assertion of Tucker, P. (*Nichols* v. *Aylor*, 7 Leigh, 565), that "repeated complaints and denials of the title of his adversary were considered as sufficiently rebutting the presumption of a grant." The only pertinency this case has to the subject now considered, arises from the manner in which the case was left to the jury. The judge left to the jury to find whether or not the right had been granted by deed, instead of submitting to them the questions of fact upon which the law presumes a grant. I agree that, if the issue upon such a claim of right is whether a deed in fact has been made, proof of verbal complaints on or off the *locus in quo*, as well as proof that no deed in fact was made during the continuance of the user, would be admissible and competent evidence; and such evidence would generally determine the issue. But this method of leaving the question to juries has been condemned by the English courts, and is at variance with the doctrine generally received by the courts of this country.

In *Olney* v. *Gardner*, 4 M. & W. 495, the decision was that, where there was unity of possession of the dominant and servient tenements, the time during which such possession was continued must not only be excluded in the computation of the twenty years, but destroyed altogether the effect of the previous possession by breaking the continuity of enjoyment. In *Bright* v. *Walker*, 1 C. M. & R. 211, it was held that, as against the reversioner, the enjoyment of an easement during a tenancy for life was not to be reckoned as part of the prescriptive period.

Eaton v. *Swansea Water Works*, 17 Q. B. 267, was an action for disturbance of a watercourse claimed by adverse user. The court held that interruptions, though not acquiesced in for a year under Statute 2 and 3 William IV., might show that the enjoyment was never of right, but was contentious throughout; and there being evidence that the owner of the servient tenement was in the habit of stopping up the trench whenever it was made, the neglect of the judge to answer a question propounded by a juror as to what would be the effect in law of a state of perpetual warfare between the parties was not a satisfactory method of leaving the case to the jury. In *Tickle* v. *Brown*, 4 A. & E. 369, it was held that the words "enjoyed by any person claiming a right," and "enjoyment thereof as of right," in the Statute, meant an enjoyment had not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion or on many, and that, therefore, proof of a parol license was competent to show that the enjoyment was permissive, and not under a claim of right. The other two English cases referred to, *Bennison* v. *Cartright*, 5 B. & S. 1; *Glover* v. *Coleman*, L. R. 10 C. P. 108, were simply interpretations of section 4 of the Statute 2 and 3 William IV., and are not authorities with respect to the principles upon which prescriptive rights are acquired or prevented at common law. In each of the cases there was an actual physical obstruction of the user, and these cases turned upon the meaning of the words "submitted to or acquiesced in," contained in section 4, which provided that no act or matter should be deemed an interruption unless it should have been submitted to or acquiesced in for one year. Mr. Goddard, writing after all these cases were decided, in his excellent treatise, says: "It is commonly said that no easement can be acquired by prescription if the user has been enjoyed *vi, clam aut precario*. The word *vi* does not simply mean by violence or force, but it means also by strife or contention of any kind — as, for instance, that the enjoyment has been during a period of litigation about the right claimed, or that the user has been continually disputed and interrupted by physical obstacles placed with a view of rendering the user impracticable." Goddard on Eas. 172.

I have not discovered in the English cases any intimation that mere denials of the right, complaints, remonstrances, or prohibitions of user, will be considered interruptions of the user of an easement, or as indicating that the enjoyment of it was contentious. On the contrary,

whenever the subject has been mentioned, it has elicited expressions of marked disapprobation of such a proposition. This is conspicuously apparent in the opinions of Bayley, J., in *Cross* v. *Lewis*, 2 B. & C. 689; of Lush, J., in *Angus* v. *Dalton*, 3 Q. B. D. 85; and of Thesiger and Cotton, Lords Justices, in the same case, as reported in 4 Q. B. D. 172, 186. Thesiger, L. J., in considering the nature of the evidence which shall contradict, explain, or rebut the presumption of right arising from an uninterrupted possession of twenty years, says that it is "not sufficient to prove such circumstances as negative an actual assent on the part of the servient owner, or even evidence of dissent short of actual interruption or obstruction to the enjoyment." In *Angus* v. *Dalton*, the easement was not such as came within the Statute 2 and 3 William IV.; and the case was discussed and decided upon the principles of the common law, independently of the statutory provision.

Some confusion on the subject has arisen from the failure to discriminate between negative and affirmative easements; negative easements, such as easements of light, and of the lateral support of buildings, which cannot lawfully be interrupted except by acts done upon the servient tenement: and affirmative easements, such as ways and the overflowing of lands by water, which are direct interferences with the enjoyment by the servient owner of the premises, and may be the subject of legal proceedings as well as of physical interruption. This distinction is pointed out by the court in *Sturges* v. *Bridgman*, 11 Ch. D. 852. In *Angus* v. *Dalton*, the Queen's Bench decided that the negative easement of lateral support of buildings could not be acquired by prescription, for the reason that the owner of the adjoining premises had no power to oppose the erection of the building and no reasonable means of resisting or preventing the enjoyment of its lateral support from his adjoining lands. But this decision was overruled in the Court of Appeals. *Angus* v. *Dalton*, 3 Q. B. D. 85; 4 Id. 162. With respect to such an easement there is great force of reasoning in the contention that slight acts of dissent should avail to defeat the acquisition of a right; for it would be unreasonable to compel the owner of the adjoining lands to dig down and undermine the foundations or to put him to legal proceedings *quia timet* to preserve dominion over his property. But no such considerations of hardship or inconvenience exist when the easement is a right of way, which, whenever the right is exercised, is a palpable invasion of property and may easily be obstructed, or is an easement of flooding lands, which is really, though not technically, a disseisin *pro tanto*, and can easily be interrupted.

The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute. The doctrine of prescription conduces, in that respect, to the interest of society, and at the same time is promotive of private justice by putting an end to and fixing a limit to contention and strife. Protests and mere denials of right are evidence

that the right is in dispute, as distinguished from a contested right. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations. Suppose an easement is enjoyed, say, for thirty years. If after such continuance of enjoyment the right may be overthrown by proof of protests and mere denials of the right, uttered at some remote but serviceable time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has his own folly and supineness to which to lay the blame. But if by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles.

Protests and remonstrances by the owner of the servient tenement against the use of the easement, rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment.

The instructions of the judge were erroneous in this respect. The jury should have been told that a continuous enjoyment under a claim of right for twenty years, not obstructed by some suable act, and having the other qualities of an adverse user, confers an indefeasible right. It is said that the instruction was given in view of evidence tending to show interruptions in fact of the right, and therefore the error was harmless. As the judgment will be reversed on other grounds, and the case may be retried, we prefer not to discuss the evidence at this time.

On the two exceptions considered here, we think the judgment should be reversed.

Exception was also taken to the charge of the judge refusing to exclude from the damages such as accrued during the term for which the plaintiff's premises were demised to other persons. The lease is dated June 2d, 1875. On the theory on which the plaintiff is entitled to an action for his injury, if the taking of his water-rights was before the lease was made, the subsequent demise was totally immaterial. In 1875, when the dam to its present height was made permanent, if not before, there was indisputably a taking *pro tanto*. How early in 1875 this was effected does not distinctly appear. If, on a retrial, it shall appear that the taking was after the rights of the tenant accrued,

so much of the damages as represent the tenant's injury can be excluded.

The other exceptions have been examined. It is sufficient to say that we find them without any legal support.

For affirmance — None.

For reversal — The Chancellor, Chief Justice, Depue, Dixon, Knapp, Parker, Reed, Scudder, Cole — 9.[1]

[1] See, accordingly, *Olcott* v. *Patterson*, 29 Pa. 22 (1857); *Conner* v. *Sullivan*, 40 Conn. 26 (1873); *Jordan* v. *Levy*, 22 So. Car. 159 (1884); *Penrith* v. *Annesley*, 90 Pa. 181 (1879). *Contra*, *Chicago & N. W. R. Co.* v. *Hoag*, 90 Ill. 339 (1878).

Note. — Involuntary Transfer. Besides the modes of voluntary transfer dealt with in the following chapters, the rights of persons in real property are sometimes transferred from them against or without their will.

Forfeiture. Forfeiture may be to the Crown or to the State for crime; or it may be to the grantor of an estate for breach of condition, or for waste. On forfeiture for crime, see 4 Bl. Com. 381–388; cf. Stimson, Am. Stat. Law, § 1162. On forfeiture for waste, see Vol. I. *ante*, Book IV. c. 4. Forfeiture for breach of implied conditions by wrongful alienation is best considered with Tortious Conveyances; and forfeiture for breach of express conditions will be dealt with in connection with conditional estates. On forfeiture for alienation in mortmain, see 2 Bl. Com. 268–273.

Execution. Land could not be taken on execution until St. 13 Edw. I. (Westm. II. 1285) c. 18, which enacted "that when debt is recovered or knowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *Fieri facias* unto the sheriff for to levy the debt of the lands and goods; (2) or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one half of his land, until the debt be levied upon a reasonable price or extent; (3) and if he be put out of that tenement, he shall recover by a writ of Novel Disseisin, and after by writ of Redisseisin, if need be." As to the writ of *Elegit*, thus created, and extents on statutes merchant, statutes staple, and obligations to the king, see 3 Bl. Com. 418–421, and Chitty's notes.

Bankruptcy. All bankrupt and insolvent Acts now contain provisions for transferring to the assignee all the land belonging to the bankrupt or insolvent.

Marriage. The transfer of property on marriage will be dealt with later.

Liens, which bind lands and prevent their alienation until they can be sold on execution, are often created under Statutes, by attachment or judgment. Cf. also the mechanics' liens which have been introduced generally in the United States.

CHAPTER III.

THE FORM OF CONVEYANCES.

NOTE. – On Seisin and Conveyance, see 1 Gray, Cas. on Prop., *c.* 3, p. 433.

The modes of conveying Real Property at common law are: (1) By Livery of Seisin; (2) By Deed; (3) By Parol, or by Parol and Entry; (4) By Record; (5) By Special Custom. The first three are dealt with in Vol. I. *c.* 3, above referred to, and in the present chapter.

CONVEYANCES BY RECORD.

A. FINES AND RECOVERIES are very ancient collusive suits brought by the person to whom the land is to be conveyed, by the person who is to convey it, and resulting in an acknowledgment that the land is the property of the complainant or demandant. The forms of fines and recoveries are given in 1 Gray, Cas. on Prop., pp. 422–425. The clearest account of their mode of operation will be found in 2 Bl. Com. 348–364. They are dealt with more in detail in Smith's Real and Personal Property (5th ed.), 955–1055. Cf. also Challis, Real Prop., *c.* 27.

Although fines and recoveries were most commonly used to bar estates tail, they were by no means confined to this. A fine, for instance, was the means ordinarily employed to pass a married woman's interest.

I. (1) A tenant in fee simple *in possession* could convey by *fine* or *recovery*. Although the seisin was tortious, yet under the St. 4 Hen. VII. (1490) *c.* 24, which is given in 1 Gray, Cas. on Prop., p. 419, after a *fine with proclamations* had been levied, the claims of all persons, not under disability, were barred at the end of five years after the fine, or, if their claims arose after the fine, then five years from the time they arose. This was in effect substituting a period of five years only for the time required by the Statute of Limitations. This result was not worked by a *fine without proclamations* nor by a *recovery*. (2) A *fine* by one seised *in remainder* in fee passed his interest; so although a *recovery* could not properly be suffered unless there was a tenant to the *præcipe*, that is, some one seised of an estate of freehold in possession, who would join in the recovery, yet if a recovery was suffered by a tenant in fee in remainder, without a proper tenant to the *præcipe*, he was bound by estoppel. A *fine with proclamations* under the St. Hen. VII., levied by one seised in fee in remainder or reversion, would after five years, bar all interests (except the preceding estate which supported the remainder), although the particular estates and the remainders or reversion had been created by a tortious conveyance. Co. Lit. 298 a.

II. The Statute *De Donis*, 13 Edw. I. (1285) *c.* 1, which is given in the 1st vol. of the Cases, p. 413, provided that an estate tail could not be barred by a fine. By *Taltarum's Case*, Y. B. 12 Edw. IV. 19 (1473), the validity of a common recovery to bar an estate tail was recognized. (1) By Sts. 4 Hen. VII. *c.* 24 (1490), and 32 Hen. VIII. *c.* 36 (1540), a tenant in tail *in possession* by a *fine* levied *with proclamations* barred the heirs in tail of the tenant immediately, and all remaindermen and reversioners and other persons except the Crown. A *recovery*, properly suffered, barred immediately all persons except the Crown. (2) A tenant in tail *in remainder* could under the Statutes above cited, by a *fine with proclamations* and non-claim, bar the heirs in tail and outside persons, but not subsequent remaindermen or the reversioner. A tenant in tail in remainder could, by a *recovery*, bar the subsequent estates, provided the immediate tenant of the freehold would join in the recovery; but if he did not join, then, for want of a good tenant to the *præcipe*, the recovery barred neither the issue

in tail nor the remaindermen, nor reversioner. This was partially altered by St. 14 Geo. II. c. 20, § 1.

III. (1) A *fine* or *recovery* by a tenant for life in *possession* worked a forfeiture of his estate, and was no bar to vested estates in remainder or to the reversion, but it destroyed contingent remainders. *Doe d. Davies* v. *Oxford*, 5 Bing. N. C. 609. Under the Statute 4 Hen. VII. c. 24, however, a *fine* by tenant for life *with proclamations* and five years' non-claim barred all persons. (2) A *fine* or *recovery* by a tenant for life or *remainder* had no effect except to pass his interest; a *fine* by him *with proclamations* under the Statute did not bar any subsequent estates in remainder or reversion, but did probably bar, after the period of non-claim, all outside claims.

IV. If a *fine* was levied, with or without proclamations, or a *recovery* suffered by a tenant for years, he forfeited his estate, but no bar was created. If a tenant for years made a tortious feoffment in fee, and the feoffee levied a fine with proclamations, then after the period of non-claim he got a good title.

V. If one who had no estate in the land, levied a *fine* or suffered a *recovery*, it had no effect on third persons, but he was himself estopped, if he afterwards became entitled to the land.

The effect of a fine with proclamations under the Statute of 4 Hen. VII. and non-claim, was to pass the title, and not merely to bar the remedy. A fine of an incorporeal hereditament levied by a life tenant, passed no more than the cognizor's interest; yet such fine was a forfeiture, as it was in case of a corporeal hereditament.

The fine spoken of in this note is the ordinary fine *sur cognizance de droit, come ceo que il ad de son donez*; the fines *sur cognizance de droit tantum* and *sur concessit* had more limited effects.

By the St. 3 & 4 Wm. 4, *c.* 74, § 2, fines and recoveries were abolished.

Fines and recoveries are generally done away with in the United States.

B. PUBLIC GRANTS. These are sometimes made by Act of the Legislature, sometimes by the Crown, or other executive power.

See 2 Bl. Com. 344–348; 3 Wash. R. P., book iii. *c.* 3, § 1.

CONVEYANCE BY SPECIAL CUSTOM.

On the mode of alienating copyholds by surrender and admittance, see Lit. §§ 73, 74, 78, printed 1 Gray, Cas. on Prop. 461. A good account of alienation by special custom will be found 2 Bl. Com. 365 (*c.* 22), and more fully in Leake, Dig. Land Law, part i. *c.* 2, pp. 70–98.

The peculiar tenure known as tenant right is copyhold, although title is passed by deed and admittance, instead of surrender and admittance. See Scriven, Copyholds (6th ed.), 14–17. But see *Langham* v. *Wardgate*, 1 Russ. & Myl. 32.

Limitations of copyholds are construed in the same manner as limitations of freeholds, and the Rule in *Shelley's Case* applied to copyholds. Scriv. 95, 96.

The Statute *De Donis* did not apply to copyholds; and therefore if, in a manor, a copyhold can be entailed (as sometimes the case), it must be by virtue of a special custom; but where there is no custom to entail, a grant of copyhold land to A. and the heirs of his body will generally give him a fee simple conditional. Where an entail of a copyhold cannot be barred by the custom in any other way, it is barred by a surrender. Scriv. 40–46. A copyholder may lease land for a year, by the general custom of the realm, without his lord's license. Scriv. 122. Admittance is compelled by mandamus or bill in equity. Scriv. 366–368; 376.

SECTION I.

CONVEYANCE TO STRANGERS.

NOTE. — On transfer at Common Law, *vide* 1 Gray, Cas. on Prop. 427, 428, 433–450, 452–455. Some other sections are here added from Littleton to bring out more clearly the character of tortious feoffments.

LIT. § 609. For if I let land to a man for term of his life, &c., and the tenant for life letteth the same land to another for term of years, &c., and after my tenant for life grant the reversion to another in fee, and the tenant for years attorn, in this case the grantee hath in the freehold but an estate for term of the life of his grantor, &c., and I which am in the reversion of the fee simple may not enter by force of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but always remains unto me, as it was before, notwithstanding such grant of the reversion made to the grantee, to him and to his heirs, &c., because nothing passed by force of such grant, but the estate which the grantor hath, &c.

LIT. § 610. In the same manner is it, if tenant for term of life by his deed confirm the estate of his lessee for years, to have and to hold to him and his heirs, or release to his lessee and his heirs, yet the lessee for years hath an estate but for term of the life of the tenant for life, &c.

LIT. § 611. But otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made but an estate for term of years, &c.

LIT. § 613. Also, if tenant in tail by his deed grant to another all his estate which he hath in the tenements to him entailed, to have and to hold all his estate to the other, and to his heirs forever, and deliver to him seisin accordingly; in this case the tenant to whom the alienation was made hath no other estate but for term of the life of tenant in tail. And so it may be well proved that tenant in tail cannot grant nor alien, nor make any rightful estate of freehold to another person, but for term of his own life only, &c.

LIT. § 615. Also, if land be let to a man for term of his life, the remainder to another in tail, if he in the remainder will grant his remainder to another in fee by his deed, and the tenant for life attorn, this is no discontinuance of the remainder.

LIT. § 617. Also, if a man be tenant in tail of an advowson in gross, or of a common in gross, if he by his deed will grant the advowson or common to another in fee, this is no discontinuance; for in such cases the grantees have no estate but for term of the life of tenant in tail that made the grant, &c.

Lit. § 618. And note, that of such things as pass by way of grant, by deed made in the country, and without livery, there such grant maketh no discontinuance, as in the cases aforesaid, and in other like cases, &c. And albeit such things be granted in fee, by fine levied in the king's court, &c., yet this maketh not a discontinuance, &c.

Lit. § 619. [Note, if I give land to another in tail, and he letteth the same land to another for term of years, and after the lessor granteth the reversion to another in fee, and the tenant for years attorn to the grantee, and the term expireth during the life of the tenant in tail, by which the grantee enter, and after the tenant in tail hath issue and die: in this case this is no discontinuance, notwithstanding the grant be executed in the life of the tenant in tail, for that at the time of the lease made for years, no new fee simple was reserved in the lessor, but the reversion remained to him in tail, as it was before the lease made.][1]

Lit. § 620. But if the tenant in tail make a lease for term of the life of the lessee, &c., in this case the tenant in tail hath made a new reversion of the fee simple in him; because when he made the lease for life, &c., he discontinued the tail, &c., by force of the same lease, and also he discontinued my reversion, &c. And it behooveth that the reversion of the fee simple be in some person in such case: and it cannot be in me which am the donor, inasmuch as my reversion is discontinued: *ergo*, the reversion of the fee ought to be in the tenant in tail, who discontinued my reversion by lease, &c. And if in this case the tenant in tail grant by his deed this reversion in fee to another, and the tenant for life attorn, &c., and after the tenant for life dieth, living the tenant in tail, and the grantee of the reversion enter, &c., in the life of the tenant in tail, then this is a discontinuance in fee; and if after the tenant in tail dieth, his issue may not enter, but is put to his writ of *formedon*. And the cause is, for that he which hath the grant of such reversion in fee simple, hath the seisin and execution of the same lands or tenements, to have to him and to his heirs in his demesne as of fee, in the life of the tenant in tail.

And this is by force of the grant of the said tenant in tail

Lit. § 622. But in this case, if tenant in tail that grants the reversion, &c., dieth, living the tenant for life, and after the tenant for life dieth, and after he to whom the reversion was granted enter, &c., then this is no discontinuance, but that the issue of the tenant in tail may well enter upon the grantee of the reversion: because the reversion which the grantee had, &c., was not executed, &c., in the life of the tenant in tail, &c. And so there is a great diversity when tenant in tail maketh a lease for years, and where he maketh a lease for life: for in the one case he hath a reversion in tail, and in the other case he hath a reversion in fee.

Lit. § 623. For if land be given to a man and to his heirs males of his body engendered, who hath issue two sons, and the eldest son hath

[1] Lord Coke says this is not in the original, but yet is good law.

issue a daughter and dieth, and the tenant in tail maketh a lease for years and die, now the reversion descendeth to the younger son, for that the reversion was but in the tail, and the youngest son is heir male, &c. But if the tenant had made a lease for life, &c., and after died, now the reversion descendeth to the daughter of the elder brother, for that the reversion is in the fee simple, and the daughter is heir general, &c.

Litt. § 631. But where the tenant in tail maketh a lease for years or for life, the remainder to another in fee, and delivereth livery of seisin accordingly, this is a discontinuance in fee, for that the fee simple passeth by force of the livery of seisin, &c.

Note. — On Uses and their employment in conveyancing, see 1 Gray, Cas. on Prop., book iii. c. 5, pp. 462–534.

29 Car. II. c. 3, §§ 1–3. For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury; (2) be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

III. And moreover, That no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

SOMERSET *v.* FOGWELL.

King's Bench. 1826.

[*Reported* 5 *B. & C.* 875.]

Trespass for breaking and entering in September, 1825, the several fishery of the plaintiff in the River Dart. The defendant put in evidence a lease in writing, not under seal, from the plaintiff to one Mills, of the fishery for four years from May, 1823; and he contended that the action ought to have been brought by Mills.

At the trial, before *Burrough*, J., the learned judge held that a term for years could not be created in a separate fishery without deed. And he directed the jury to find for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.[1]

The defendant having obtained a rule *nisi* for entering a nonsuit,

Erskine now showed cause.

Selwyn, contra.

Cur. adv. vult.

Bayley, J. The material question in this case was, whether the plaintiff had, by his agreement entered into with Mills, put it out of his power to maintain the action. He had entered into an agreement to let to Mills all his fishery in the River Dart, with all rights and privileges appurtenant to the said fishery for a period extending beyond the time when the alleged trespass was committed. If by that instrument he legally dispossessed himself of the right for the term therein mentioned, the defendant is entitled to have a nonsuit entered. For the plaintiff it was contended that the fishery lay in grant, and that a term, even for years, could only be created by deed. On the other side it was admitted, that such would be the consequence if the fishery lay in grant and not in livery; and looking at the authorities, we find many which establish that a term for years in a thing lying in grant cannot be created without deed. Several such cases are collected in 14 Vin. Abr. tit. Grant (G a), and most of them are also in 2 Roll. Abr. 63, tit. Grant (G). I will mention a few of them, as the point is of importance. In Co. Lit. 85 a, which is a commentary on the words *per fait ou sans fait*, in Lit. § 116, it is said, "Here Littleton affirmeth that the wardship of the body may be granted over without deed, and herein note a diversity between an original chattel of a thing that properly lieth in grant, and a chattel derived out of a freehold of anything that lieth in grant. As for example, if a man make a lease for years of a villein, this cannot be done without deed, neither can the lessee assign it over without deed, because it is derived out of a freehold that lieth in grant. But the wardship of the body is

[1] The above statement is substituted for that in the report.

an original chattel during the minority, derived out of no freehold, and therefore as the law createth it without deed, so it may be assigned over without deed." It is singular that both in 2 Roll. Abr. 62, and in Vin. Abr. Grant (G a), this passage is cited, with the word *vill* instead of *villein*, but that is clearly a mistake. In 2 Roll. Abr. 63, pl. 14, it is said that a parson cannot grant his tithes to a stranger for life or for years without deed, because it is entirely in grant; and pl. 16 shows, that it makes no difference whether the grant be for one year or for several. In pl. 17 a distinction is taken between a grant of tithes to a stranger and to the owner of the land. In the latter case it may be without deed, because it is in the nature of a composition for the tithes retained, and not a grant of tithes. In Vin. Abr. Grant (G a), pl. 29, Godb. 74 is cited, where it is said *arguendo* that a warren may be demised without deed; and reference is made to the 9 Ed. 4, 47. There may be a difference according to the sort of warren leased, viz. where a warren with the land is leased (in which case by the warren the land would be intended), and where the franchise only is demised. In the former case the lease might be good without deed; and if that was the nature of the lease spoken of in Godb., the position is correct, otherwise not; and in 9 H. 4, 47, it is said that warren cannot be leased without deed; and the same is laid down in Bro. Abr. tit. Lease, pl. 12; and this doctrine is adopted in *Saunders* v. *Owen*, 2 Salk. 467. The question then is, whether the subject-matter of the agreement between the plaintiff and Mills lay in grant, as an incorporeal, or in livery as a corporeal thing. [The learned judge then proceeded to consider this question, and determined that the subject of the agreement with Mills was an incorporeal hereditament; that therefore Mills took nothing under the agreement; and that the plaintiff could maintain the action.]

Rule discharged.

BIRD *v.* HIGGINSON.

KING'S BENCH. 1835.

[*Reported* 2 *A. & E.* 696.]

ASSUMPSIT. The first count of the declaration stated an agreement, made 8th of August, 1833, whereby the plaintiff agreed to grant and let to the defendant, and the defendant to take, a certain messuage or tenement, situate at Dinas Mowddy, in the parish, &c., together with "full and free and exclusive license and leave to and for the defendant and his servants, &c., to hunt, hawk, course, shoot, and sport, in, over, and upon all that the manor of Dinas Mowddy, situate in, &c., and to fish in the ponds and waters thereof at all seasonable times during the term thereinafter mentioned, doing no wilful," &c., "to hold the said messuage or tenement, right, liberties, and premises, thereby agreed to be

let unto the defendant, his executors," &c., from the day of the date, &c., until the 1st of February then next, at a rent of £200, £100 payable on 12th of October then next, and £100 on 1st of February then next, which the defendant agreed to pay to the plaintiff, his heirs, &c. The declaration then averred mutual promises, and that the plaintiff then let unto the defendant the said messuage or tenement, "right, liberties, and premises, so agreed," &c., "from the day," &c.; "and the defendant then entered into and upon the same, and became and was possessed thereof, for the said term so to him thereof agreed to be granted as aforesaid." And although the plaintiff hath always, &c., yet, &c. (Breach, non-payment of the two parcels of rent.)

There was a second count on an account stated.

The first two pleas are not material. Third plea: "And for a further plea as to the first count of the said declaration, the defendant says that the said manor, at the time of making the said agreement therein mentioned, was a manor containing divers, to wit 32,000 acres of land; and the said messuage or tenement in the said agreement mentioned then was a small house, taken by the defendant, and intended to be occupied by him, solely for the more convenient enjoyment of the exclusive right or liberty in the said agreement mentioned to be demised or granted to him in and over the said manor. And the defendant further says, that the said agreement, mentioned to be made between the plaintiff of the one part and the defendant of the other part, was and is an agreement under the respective hands of the plaintiff and of one John Eldad Waters, as the agent of the defendant in that behalf; and the same was not nor is sealed with the seal either of the plaintiff or of the defendant, or of any person or persons by them or either of them thereunto lawfully authorized: wherefore the said agreement was and is void in law; and this the defendant is ready to verify," &c. (No prayer of judgment.)

To this plea the plaintiff demurred specially, assigning for cause, that, whereas the plea is pleaded to the first count only of the declaration, yet the said third plea does not aver that the plaintiff ought not to have or maintain his aforesaid action thereof against him the said defendant; and also that, although the said third plea is pleaded to the said first count only as above mentioned, yet the said plea does not contain any prayer of judgment; and also that the said third plea amounts to the general issue; and also that the said third plea is argumentative in this, viz. that it indirectly denies that any promise was made by the defendant as in the said first count mentioned; and also that the said third plea is wrongly concluded in this, viz. that, although it denies that any valid promise was made as in the declaration mentioned, yet it does not conclude to the country, but with a verification; and also that the said third plea is in other respects, &c.

Kelly, in support of the demurrer.

Sir John Campbell, contra.

Cur. adv. vult.

Lord Denman, C. J., now delivered the judgment of the court. After stating the declaration and third plea, his Lordship proceeded as follows : —

The plaintiff demurred, assigning the omission to pray judgment for special cause : but we think the defect is expressly cured by the ninth of the new rules (Hil. 4 W. 4, General Rules and Regulations, 9 ; 5 B. & Ad. v.) : " In a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*," " or any prayer of judgment." " The whole action generally " means the whole cause appearing in the count to which the plea is pleaded.

The other objection is of a more general nature, namely, that the agreement is for the conveyance of an incorporeal hereditament, and ought, therefore, to have been under seal. And we are clearly of that opinion. We wished however for some time, to consider whether the plaintiff might not be entitled to recover on this count, for the actual enjoyment of the thing demised. On examining it more accurately, we find that this count is not so framed, for it only alleges that the defendant entered and became possessed for the term, which he might do without a single hour's occupation of the premises. There are other objections, but this is decisive.

Judgment for the defendant.[1]

JACKSON d. GOUCH *v.* WOOD.

Supreme Court of Judicature of New York. 1815.

[*Reported* 12 *Johns.* 73.]

This was an action of ejectment for lot No. 7 in the town of Locke, in the County of Onondaga, and was tried before Mr. Justice *Thompson*, at the Cayuga Circuit, in June, 1813.

The lessors of the plaintiff gave in evidence the exemplification of a patent, dated the 13th of June, 1791, to John Day, for the lot in question. He then proved that Moses Gouch was the identical person who served and was known in the New York line of the army by the name of John Day, and that he was the same person to whom the patent was granted by that name. It was also proved that Moses Gouch, *alias dictus* John Day, was dead, and that the lessors of the plaintiff were his heirs-at-law.

[1] Judgment was affirmed in the Exchequer Chamber, 6 A. & E. 824 (1837). In the course of the argument, Parke, B., said : " If a right of way were granted *de novo*, a deed would be requisite."

The case of *Tottell* v. *Howell*, Noy, 54 (1595), in the Common Bench was this : " It was held by the court that *herbagium*, for years, cannot be granted without deed. Note 17 E. 4, 6."

The defendant gave in evidence an instrument in writing, indorsed on the original patent, dated the 19th of November, 1792, signed "John $\frac{\text{his}}{\text{mark}}$ Day," but without any seal, by which he, John Day, for the consideration of ten pounds, paid to him by Benjamin Prescott, bargained, sold, remised, released, and quitclaimed to the said Benjamin Prescott, his heirs and assigns, all his right, title, claim, and interest, of, in, and to, the premises granted and described in the patent, to have and to hold the same to the said Benjamin Prescott and to his heirs and assigns, to his and their only proper use and benefit forever; and to this instrument the names of two witnesses were subscribed.

There never having been any *seal* to the writing thus indorsed on the patent, it was objected, on the part of the plaintiff, that it amounted to no more than a *parol* contract, and was not sufficient to pass the land. This point was reserved by the judge, and the defendant gave in evidence sundry mesne conveyances from Benjamin Prescott to himself, all of which had been duly recorded: he also showed a possession for seven or eight years. A verdict was taken for the plaintiff, subject to the opinion of the court on a case, as above stated.

Seely, for the plaintiff.

Van Buren, contra.

PLATT, J., delivered the opinion of the court.

The single question in this case is, whether an *estate in fee* can be conveyed otherwise than by *deed:* that is to say, whether a *seal* is essential to such conveyance.

The earliest mode of transferring a freehold estate, known in the English common law, was by *livery of seisin* only (Co. Lit. 49 b, 48 b). But when the art of writing became common among our rude ancestors, the deed of *feoffment* was introduced, in order to ascertain with more precision the nature and extent of the estate granted, with the various conditions and limitations. This deed, however, was of no validity, unless accompanied by the old ceremony of livery and seisin (2 Black. Com. 318).

The Statute of Uses (27 Hen. VIII.) gave rise to the deed of *bargain and sale;* and soon afterwards, the conveyance by *lease and release* was introduced, in order to avoid the necessity of enrolment, required by the Statute of 27 Hen. VIII. (2 Black. Com. 343). By virtue of the Statute of Uses, which we have adopted, (without the proviso in the English Statute requiring the enrolment of deeds,) the deed of bargain and sale, now in use here, is equivalent to the deed of feoffment with livery of seisin, (2 Black. Com. 339, 343,) and has, in practice, superseded the *lease and release.*

By the common law, estates *less than a freehold* might be created or assigned, either by *deed*, by *writing*, *without seal*, or by *parol merely.*

By the 29 Car. II. *c.* 3 (9th and 10th sections of our "Act for the Prevention of Frauds") it was enacted, "that all leases, estates, inter-

est of freehold, or terms of years, or any uncertain interests in lands, &c., made or executed by livery and seisin only, or by parol, and not in writing, and signed by the parties so making and creating the same, shall have the force and effect of leases or estates at will only; excepting leases for three years and less," &c.; and "that no leases, estates, or interests, either of freehold, or terms of years," &c., "in any lands," &c., "shall, at any time hereafter, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same," &c.

Now, it is contended on the part of the defendant, that the common law mode of conveyancing has been so modified by this Statute, as to destroy the distinction between an estate of *freehold*, and an estate *less than a freehold*, as it regards the mode of alienation; and that *either* may now be conveyed by "*note in writing*" without seal, as well as by *deed*.

No direct decision appears to have been made on this point; but in the case of *Fry* v. *Philips*, 5 Burr. 2827, and in the case of *Holliday* v. *Marshall*, 7 Johns. Rep. 211, it was decided, that a written assignment of a lease for ninety-nine years was valid, though not sealed; upon the express ground, that it was the sale of a *chattel-real*, for which the Statute of Frauds requires only a "note in writing;" plainly recognizing the distinction between a *term for years* and a *freehold estate*, as to the mode of conveyance.

According to Sir William Blackstone, (2 Black. Com. 309, &c.) *sealing* was not in general use among our Saxon ancestors. Their custom was, for such as could write, to sign their names, and to affix the sign of the cross; and those who could not write, made their mark in sign of the cross, as is still continued to this day. The Normans used the practice of *sealing only*, without writing their names; and, at the Conquest, they introduced into England *waxen seals*, instead of the former English mode of writing their names and affixing the sign of the cross; it being then usual for every freeman to have his distinct and particular seal. The neglect of signing, and resting upon the authenticity of seals alone, continued for several ages, during which time it was held, by all the English courts, that sealing alone was sufficient. But in process of time, the practice of using particular and appropriate seals, was, in a great measure, disused; and Sir William Blackstone (2 Black. Com. 310) seems to consider the Statute of 29 Car. II. *c.* 3 (of which the 9th and 10th sections of our Statute of Frauds are a copy) as reviving the ancient Saxon custom of *signing*, without dispensing with the *seal*, as then in use, under the custom derived from the Normans.

We have the authority of that learned commentator, unequivocally in favor of the opinion, that a *seal* is indispensable in order to convey an estate in fee simple, fee tail, or for life (2 Black. Com. 297, 312).

Such seems to have been the practical construction, ever since the Statute of Car. II. in England, and under our Statute of Frauds in this

State; and to decide now, that a seal is unnecessary to pass a fee, would be to introduce a new rule of conveyancing, contrary to the received opinion, and almost universal practice, in our community; and dangerous in its retrospective operation. Construing this Statute with reference to the pre-existing common law, and the particular evil intended to be remedied, I think the Legislature did not intend to dispense with a seal, where it was before required, as in a conveyance of a freehold estate; but the object was to require such deeds to be *signed* also, which the courts had decided to be unnecessary.

I construe this Statute as though the form of expression had been thus: "No estate of freehold shall be granted, unless it be by deed *signed* by the party granting; and no estate less than a freehold (excepting leases for three years, &c.) shall be granted or surrendered, unless by deed, or note in writing *signed* by the grantor."

This venerable custom of *sealing*, is a relic of ancient wisdom, and is not without its real use at this day. There is yet some degree of solemnity in this form of conveyance. A seal attracts attention, and excites caution in illiterate persons, and thereby operates as a security against fraud.

If a man's freehold might be conveyed by a mere *note in writing*, he might more easily be imposed on, by procuring his signature to such a conveyance, when he really supposed he was signing a receipt, a promissory note, or a mere letter.

The plaintiff is entitled to judgment.

Judgment for the plaintiff.[1]

SECTION II.

RELEASES.

Lit. § 444. Releases are in divers manners, viz. releases of all the right which a man hath in lands or tenements, and releases of actions personals and reals, and other things. Releases of all the right which men have in lands and tenements, &c., are commonly made in this form, or of this effect: —

Lit. § 445. Know all men by these presents, that I, A. of B., have remised, released, and altogether from me and my heirs quitclaimed (*me A. de B. remisisse, relaxasse, et omnino de me et hæredibus meis quietum clamasse*): or thus, for me and my heirs quitclaimed to C. of D. all the right, title, and claim (*totum jus, titulum, et clameum*) which I have, or by any means may have, of and in one messuage with the appurtenances in F., &c. And it is to be understood, that these words, *remisisse et quietum clamasse*, are of the same effect as these words, *relaxasse*.

[1] See *Jones* d. *Mayberry* v. *Johnson*, 3 Green, 116.

Lit. § 447. Also, in releases of all the right which a man hath in certain lands, &c., it behooveth him to whom the release is made in any case, that he hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made hath the freehold in deed, or in law, at the time of the release, &c., there the release is good.

Lit. § 449. Also, in some cases of releases of all the right, albeit that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which he hath by disseisin to another for term of his life, saving the reversion to him, if the disseisee or his heir release to the disseisor all the right, &c., this release is good, because he to whom the release is made, had in law a reversion at the time of the release made.

Lit. § 450. In the same manner it is, where a lease is made to a man for term of life, the remainder to another for term of another man's life, the remainder to the third in tail, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because every of them hath a remainder in deed vested in him.

Lit. § 451. But if the tenant for term of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all his right, this release is void, because he had not a remainder in deed at the time of the release made, but only a right of a remainder.

Lit. § 459. Also, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

Lit. § 460. In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c., this release is good enough for the privity which is between them; for it shall be in vain to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

But the contrary is holden, Pasch. 2 E. 4, by all the justices.[1]

[1] "By these two sections is to be observed a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because between them there is a possession with a privity; but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for years hold over his

Lit. § 461. But where a man of his own head occupieth lands or tenements at the will of him which hath the freehold, and such occupier claimeth nothing but at will, &c., if he which hath the freehold will release all his right to the occupier, &c., this release is void, because there is no privity between them by the lease made to the occupier, nor by other manner, &c.

Lit. § 465. Also, releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to whom the release is made. As if I let certain land to one for term of years, by force whereof he is in possession, and after I release to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath he an estate but for term of his life. And the reason is, for that when the reversion or remainder is in a man who will by his release enlarge the estate of the tenant, &c., he shall have no greater estate, but in such manner and form as if such lessor were seised in fee, and by his deed will make an estate to one in a certain form, and deliver to him seisin by force of the same deed; if in such deed of feoffment there be not any word of inheritance, then he hath but an estate for life; and so it is in such releases made by those in the reversion or in the remainder. For if I let land to a man for term of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and to his heirs, then he hath a fee simple; and if I release to him and to his heirs of his body begotten, then he hath a fee tail, &c. And so it behooveth to specify in the deed what estate he to whom the release is made shall have.

Lit. § 466. Also, sometimes releases shall mure *de mitter*, and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his state was wrongful, now by this release it is made lawful and right.

Lit. § 467. But here note, that when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speak of the heirs of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an hour, this shall be as strong to him in law as if he had released to him and his heirs. For when his right was once gone from him by his release without any condition, &c., to him that hath the fee simple, it is gone forever.

Lit. § 468. But where a man hath a reversion in fee simple, or a remainder in fee simple, at the time of the release made, there if he

term, &c., a release to him is void, for that there is no privity between them; and so are the books that speak of this matter to be understood.

"'But the contrary is holden, &c.' This is of a new addition, and the book here cited ill understood, for it is to be understood of a tenant at sufferance." Co. Lit. 270 b.

will release to the tenant for years, or for life, or to the tenant in tail, he ought to determine the estate which he to whom the release is made shall have by force of the same release, for that such release shall inure to enlarge the estate of him to whom the release is made.

Lit. § 469. But otherwise it is where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heirs of him to whom the release is made. For if I let lands to one for term of his life, if I after release to him to enlarge his estate, it behooveth that I release to him and to his heirs of his body engendered, or to him and his heirs, or by these words, To have and to hold to him and to his heirs of his body engendered, or to the heirs male of his body engendered, or such like estates, or otherwise he hath no greater estate than he had before.

Lit. § 470. But if my tenant for life letteth the same land over to another for term of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for term of life, I shall be barred forever, albeit that no mention be made of his heirs, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, which my tenant made in this case, my reversion was discontinued, &c., and this release shall inure to him in the remainder, to have advantage of it, as well as to the tenant for term of life.

Lit. § 471. For to this intent the tenant for term of life and he in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him. &c.

Lit. § 479. But releases which inure by way of extinguishment against all persons, are where he to whom the release is made cannot have that which to him is released. As if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seigniory, or all the right which he hath in the land, &c., this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself.

Lit. § 480. In the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, &c., because the tenant cannot have that which to him is released, &c., so such releases shall inure by way of extinguishment in all ways.[1]

[1] A release inuring by way of *mitter l'estate* is "where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releases to the other the benefit of it. In releases which operate by this last mode, the releasee being supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or pretension of another seised under the same contract, words of inheritance in the release are useless; for where the release operates by enlargement, the releasee having no such previous inheritance, and fiefs being either for life or in fee, as they are originally granted, the release gives the estate to the releasee for his life only, unless it be expressly made to him and his heirs." Butler's note to Co. Lit. 273 b.

SECTION III.

SURRENDERS.

Co. Lit. 337 b. "Surrender," *sursum redditio*, properly is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.

Co. Lit. 338 a. A surrender properly taken is of two sorts, viz. a surrender in deed, or by express words, (whereof Littleton here putteth an example,) and a surrender in law wrought by consequent by operation of law. Littleton here putteth his case of a surrender of an estate in possession, for a right cannot be surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendered, because there is no reversion wherein it may drown; but by a surrender in law it may be drowned. As if the lessee before Michaelmas take a new lease for years either to begin presently, or at Michaelmas, this is a surrender in law of the former lease. *Fortior et a quior est dispositio legis quam hominis.*

Also there is a surrender without deed, whereof Littleton putteth here an example of an estate for life of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yielding, or a restoring of, the state again to him in the immediate reversion or remainder, which are always favored in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot commence without deed, and by consequent the estate cannot be surrendered without deed. But in the example that Littleton here putteth, the estate might commence without deed, and therefore might be surrendered without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and quality of the thing demised, because the particular estate might have been made without deed; and so on the other side. If a man be tenant by the curtesy, or tenant in dower of an advowson, rent, or other thing that lies in grant; albeit there the estate begin without deed, yet in respect of the nature and quality of the thing that lies in grant it cannot be surrendered without deed. And so if a lease for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. See in my Reports plentiful matter of surrenders.

WHITLEY *v.* GOUGH.

1557.

[*Reported Dyer*, 140 *b.*]

In trespass between Whitley, widow, and Gough, there was a demurrer in law upon the evidence, where the husband of the plaintiff made a lease by indenture to the defendant for a term of ninety years, and afterwards enfeoffed certain persons, and took back an estate to himself and his said wife in tail; and afterwards the termor took a new lease of the husband for eighteen years only, to commence immediately, by parol; and afterwards the husband died, and his wife ousted the termor. And by the opinion of the judges she may well do this, for the first lease was surrendered and merged in law by the acceptance of the second, &c. See E. 3 Eliz. fol. 200, pl. 62.

IVE *v.* SAMS.

Common Pleas. 1596.

[*Reported Cro. El.* 521.]

Waste. And counts of a demise for thirty years made to the defendant of the manor of Tottenham, in Essex. The defendant pleads *non dimisit modo et forma;* and thereupon a special verdict was found, that J. S. let the manor to the defendant for thirty years *exceptis omnibus boscis, et subboscis;* and afterwards made another lease to the same lessee for sixty years of "all woods and underwoods growing, and being upon the manor without impeachment of waste;" and after that made a third lease to the same lessee for thirty years of the manor, to commence after the end of the first term. The first term expires, the lessee afterwards cuts down trees, and Ive having the reversion brings waste. *Et si, &c.*

Hearn, for the plaintiff.

Glanville, e contra.

Walmsley, [J]. It is agreed in *Culpepper's Case*, Dyer, 184, that if I sell trees growing within my land, they are now become chattels; but if I buy them again, they are now rejoined to the inheritance: and here by this exception of the wood the soil is excepted, and severed from the manor in possession, but it is parcel of the reversion of the manor; and there is not any difference where parcel is let and where parcel is excepted, so it passed by the taking of the third lease, which was clearly a surrender, or extinguishment of the second lease presently, although this third lease is to commence at a day future, as it hath been agreed

in this court; because by his acceptance he allows the lessor able to let the land during the other lease.

ANDERSON, [C. J.] There is no doubt but that the soil of the wood is excepted, and yet it remains parcel of the reversion of the manor, and shall pass by a grant or lease of the manor, and shall be recovered by a recovery of the manor; and there is not any difference to this purpose betwixt a lease of parcel and an exception of parcel of the manor. And I agree, that if trees be severed from the manor by grant, yet, if they afterwards return to him who had the manor, they are rejoined, and are not chattels in him; and that his acceptance of the third lease was presently a surrender or extinguishment of the second lease; for he could not have the land and trees in him in several degrees, but the trees shall be rejoined to the land by the last lease: and if lessee for twenty years takes a lease for ten years, to begin at Michaelmas, there is no doubt but that the term for twenty years is surrendered or determined presently; for by the lessee's acceptance the lessor hath power to make a new lease during the former, and at the time of the lease making. Wherefore, &c.

BEAUMOND, [J.] agreed with him *in omnibus*. — Wherefore (*absente* OWEN, [J.]) judgment was given for the plaintiff. — NOTE. WALMSLEY, [J.] said, if one bargains and sells his trees to one, and after let the land to him for years, the trees are now *rejoined* to the land; so that if the lessee cuts them down, he shall be punished in waste. *Sed quære de eo.* 5 Co. 11.[1]

MAGENNIS *v.* MAC-CULLOGH.

EXCHEQUER IN IRELAND.[2]

[*Reported Gilb. Cas. in Eq.* 235].

RICHARD CLOSE being tenant for life, with remainder to his first and other sons in tail, with several remainders over to the brothers of Richard, the reversion to Richard in fee (*qu.* out the will). Richard makes a lease for years by indenture, to William Mac-Cullogh, and afterwards has the lease delivered up to him by William Mac-Cullogh; and then Richard tears off the seal by the consent of William; William continues in possession after the lease was cancelled as aforesaid; and some time after, Richard makes a lease to William, being in possession, of the same lands for three lives, with livery and seisin; after livery

[1] If a lease is void, its acceptance is not a surrender of a former lease. *Watt* v. *Mackerell*, Batt. 104 (1728); *Forrest* v. *Stanley*, 4 Barn. 2310 (1708); *Doe* d. *Leicester* v. *Biggs*, 11 Q. B. 702 (1848); *Doe* d. *Rudolph* v. *Poole*, Id. 713 (1848). See *Cox* v. *Hickie*, 72 N. Y. 141 (1878). If *Milliken* v. *May*, 2 Cro. El. 874 (1602), is correctly reported, it must be considered as overruled.

[2] The date is not given, but Sir Jeffrey Gilbert was Chief Baron of the Exchequer in Ireland from 1715 to 1722.

and seisin, Richard marries and has a son Richard, the lessor of the plaintiff.

Question 1. Whether the lease for years be surrendered by the cancelling the indenture as aforesaid?

Question 2. Whether the contingent remainders to the first and other sons of Richard the father, be destroyed by the lease for lives, made as aforesaid by Richard the father.

The above case, and points thereon, are referred to the Right Honorable the Lord Chief Baron GILBERT, for his judgment, at his chamber.

I am of opinion, that since the Statute of Frauds and Perjuries, a lease for years cannot be surrendered by cancelling of the indenture without writing; because the intent of that Statute was to take away the manner they formerly had, of transferring interests to lands, by signs, symbols, and words only; and therefore, as a livery and seisin on a parol feoffment was a sign of passing the freehold before the Statute, but is now taken away by the Statute; so I take it, that the cancelling of a lease was a sign of a surrender before the Statute, but is now taken away, unless there be a writing under the hand of the party. And the words, viz., "By act and operation of law," are to be construed a surrender in law, by the taking a new lease; which being in writing, is of equal notoriety with a surrender in writing.

2dly. I am of opinion, that if the lease for years continued in being till the lease for lives was made, &c., as it seems by the case that it did, then that interest which passed from Richard Close to William Mac-Cullogh, did not pass by livery and seisin, so as to work a discontinuance of the estate for life, but only by way of release to the tenant for years, and by way of enlarging of his estate; for it was a reversion depending on a lease for years, and passes by way of grant and attornment to a stranger, and by way of release to the tenant himself; and such grant and release transfers no more than the tenant for life might lawfully pass, viz., an estate during the life of the tenant for life; and consequently, the particular estate for life was in being when the contingent remainder came in *esse*; and therefore I think the plaintiff must have the *postea*. 19 H. 6, 33; Cro. Eliz. 487; Brook, Surrender 49, Tit. Dower 55, *Hugh Cholmly's Case*.[1]

[1] See *Roe* d. *Berkeley* v. *Archbishop of York* (1805), 6 East, 86, *accord*. Cf. *Walker* v. *Richardson*, 2 M. & W. 882 (1837).

MOLLETT *v.* BRAYNE.

NISI PRIUS. 1809.

[*Reported* 2 *Camp.* 103.]

ASSUMPSIT for use and occupation. Plea, tender as to part, and non-assumpsit as to the residue.

It appeared that the defendant took the premises in question of the plaintiff, at Lady-day, 1808, at the yearly rent of £12. In the November following, disputes arose between the parties as to the doing of some repairs. The defendant then threatening to quit the premises, the plaintiff said, "You may quit when you please." The defendant accordingly left the premises a few days after, and tendered the plaintiff rent for a day beyond the time he had occupied them. This sum was paid into court upon the tender pleaded; and the question now was, whether the plaintiff was entitled to rent after the defendant had quitted?

LORD ELLENBOROUGH was of opinion that the tenancy was not determined merely by the landlord giving the tenant a parol license to quit, and the tenant quitting accordingly. At that time there was a subsisting term in the premises, and the *Statute of Frauds* (29 Car. 2, *c.* 3, § 3) provides, that no lease or term of years, or any uncertain interest of or in any messuages, lands, tenements, or hereditaments, shall be surrendered unless by deed or note in writing, or by act and operation of law. Here, there was no deed or note in writing, and nothing is proved which can be considered a surrender by operation of law.

The plaintiff had a verdict for the rent down to Lady day, 1809; and the court of K. B upon a motion for a new trial approved of the direction at Nisi Prius, and refused a rule to show cause.

Park and —— for the plaintiff.

Garrow and *F. Pollock*, for the defendant.

THOMAS *v.* COOK.

KING'S BENCH. 1818.

[*Reported* 2 *B. & Ald.* 119.]

ACTION for use and occupation. At the trial of this cause at the London sittings after Trinity Term before *Abbott*, J., it appeared that the plaintiff had originally let the premises, consisting of a house in Long Lane, to the defendant as tenant from year to year. After he had resided there for some time, the defendant underlet them to one Perkes, commencing at Christmas 1816. At Lady-day 1817, defendant distrained Perkes's goods for rent in arrear. Rent being then due from

the defendant to Thomas, the latter gave notice to Perkes not to pay the rent to the defendant, but to him; and upon Cook's refusing to take Perkes's bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from Cook to him, saying that he would not have anything further to do with Cook. And afterwards, in October 1817, the plaintiff himself distrained the goods of Perkes for rent in arrear. The jury found, by the direction of the learned judge, a verdict for the defendant, on the ground that Thomas had, with the assent of Cook, accepted Perkes as his tenant of the premises. And now

Topping moved for a new trial.

Abbott, C. J. By the third section of the Statute of Frauds, it is enacted "that no leases, estates, or interests, either of freehold, terms of years, or any other uncertain interest in any messuages, manors, lands, tenements, or hereditaments shall be surrendered, unless by deed or note in writing, or by act and operation of law." And the question in this case is, whether what has been done will amount to a surrender by act and operation of law. Now the facts of the case are these. The plaintiff Thomas had let the premises in question to the defendant as tenant from year to year, and the defendant underlet them to Perkes. The rent being in arrear, the defendant, on Lady-day 1817, distrained the goods of Perkes, who having tendered a bill in payment of the rent which the defendant had refused to receive, the plaintiff then interposed, took the bill in payment, and accepted Perkes as his tenant: and afterwards in October 1817, himself distrained the goods of Perkes for rent then in arrear. I left it to the jury to say whether under these circumstances the plaintiff had not, with the assent of Cook, accepted Perkes as his tenant of the premises, and the jury found that fact in the affirmative. I think, therefore, this amounted to a valid surrender of Cook's interest in the premises, being a surrender by act and operation of law. The consequence is that the plaintiff can have no claim for rent against the present defendant, and that the verdict therefore was right.

Bayley, J. If a lessee assigns over his interest, and the lessor accepts the assignee as his tenant, the privity of estate is thereby destroyed, and on that ground it is not competent for the lessor to bring debt against the lessee. Where, indeed, the contract is by deed, there he may bring covenant by the Statute of II. 8. In this case, the landlord has accepted Perkes as his tenant, and must be considered to have made his election between Perkes and Cook. And the case of *Phipps* v. *Sculthorpe*, 1 Barn. & Ald. 50, is an authority to show that the plaintiff has no right to recover. This was a surrender of Cook's interest in the premises by act and operation of law, and the jury were quite right in presuming that Cook had assented to the acceptance of Perkes as tenant to the plaintiff; for that assent was clearly for Cook's benefit.

Holroyd, J. It appears from the Statute of Frauds, that a surrender, in order to be valid, must be either by deed or note in writing, or by act and operation of law. In *Mollett* v. *Brayne*, 2 Campb. 103,

there was only a parol surrender, and no circumstance existed in that case which could constitute a surrender by act and operation of law. But in this case, there is not merely a declaration by the plaintiff, that he will no longer consider Cook as his tenant, but there is also the acceptance by him of another person as the tenant, and that acceptance is assented to by Cook. Now, if a lease be granted to an individual, and there be a subsequent demise of the premises by parol to the same person, that will amount to a surrender of his lease. Then the circumstances of Cook having first put in another person as undertenant, and having afterwards assented to a second demise by the plaintiff to that person, will in the present case amount to a virtual surrender of his interest by act and operation of law. Notwithstanding therefore the third section of the Statute of Frauds, I am of opinion, that the facts here found by the jury amount to a valid surrender of Cook's interest, and a re-demise of the premises by the plaintiff to Perkes. In that case there will be no ground for disturbing the present verdict.

Rule refused.[1]

HAMERTON *v.* STEAD.

King's Bench. 1824.

[*Reported* 3 *B. & C.* 478.]

Trespass for breaking and entering a mill, dwelling-house, and close of plaintiff, ejecting him therefrom, and keeping him out of possession for a long space of time. Plea, *liberum tenementum*. Replication, that before the said time when, &c., to wit, on, &c., defendant demised the premises to plaintiff, as tenant from year to year, by virtue of which demise plaintiff entered, and was possessed of the premises, and continued so possessed until and at the said time when, &c. Rejoinder, that after the making of the said demise in the replication mentioned, and before the said time when, &c., the said tenancy, and the estate and interest of the plaintiff in the demised premises, in which, &c., wholly ended and determined. Surrejoinder, that the tenancy, &c., did not end and determine in manner and form alleged in the rejoinder. At the trial, before *Garrow*, B., at the last Spring Assizes for Salop, it appeared that on the 1st of May 1810, the premises in question were demised by the defendant to the plaintiff, as tenant from year to year, and he continued so to hold them until the 25th of September 1815, when notice was given to him to quit on the 1st of May then next. On the 10th of October 1815, by an agreement in writing, made between the defendant of the one part, and the plaintiff and one Moore of

[1] See *Lynch* v. *Lynch*, 6 Ir. L. R. 131 (1843), where the lease held to be surrendered *pro tanto* by a parol agreement for a new lease. See also *Dawson* v. *Gent*, 1 H. & N. 744 (1857); *Amory* v. *Kannofsky*, 117 Mass. 351 (1875). But *Bailey* v. *Wells*, 8 Wis. 141 (1859), is *contra*, and cf. *Hunt* v. *Gardner*, 32 N. J. L. 530 (1877).

the other part, defendant agreed to let and demise unto plaintiff and Moore the premises in question, to hold them unto plaintiff and Moore from the 1st of November then next, for seven years thence next ensuing, at a yearly rent of £159, payable half yearly on the 1st of May and 1st of November. Plaintiff and Moore thereby agreed to pay the rent and all taxes, except the landlord's property tax; and defendant agreed to put all the premises in tenantable repair as soon as conveniency would permit. And the plaintiff and Moore further agreed to keep the premises in repair, and leave them so at the end of the term; and lastly, it was further agreed that a lease should be forthwith drawn, in which the usual covenants were to be inserted, and particularly that the lessees should not let, set, or assign the premises, or any part thereof, without the lessor's consent in writing. The lessees took possession under this agreement, and Moore continued to occupy the premises jointly with Hamerton until April 1816, and then quitted. In June the same year, defendant not being able to get any rent, a negotiation was entered into respecting the surrender of the premises, but that proved fruitless; and defendant having obtained the keys, took and retained possession of the mill and other premises. For the defendant, it was objected that the new agreement in October 1816 was a lease, and put an end to the original tenancy of the plaintiff; or, at all events, if it was only an agreement for a lease, yet that the agreement, together with the fact of Moore's having been let into possession by virtue of it, as a joint occupier with the plaintiff, worked a surrender in law of the old tenancy. The learned judge reserved the point, and a verdict having been found for the plaintiff, a rule *nisi* to enter a nonsuit was obtained in Easter Term; and now

W. E. Taunton showed cause.

Campbell (with whom was *Oldnall Russell*), contra.

Abbott, C. J. In *Roe* v. *The Archbishop of York* [6 East, 86], the occupation by virtue of the new lease took place under a mistaken idea, that it was a good and valid lease; and when that was discovered to be void, the court very properly held that it should not operate as a surrender of the former lease. Here, there is nothing to show that the defendant refused to grant such a lease as was contracted for; and we find, in fact, that a new contract was made to let the premises to two persons instead of one, and that both entered and occupied. The lessor might then have sued both for the rent, although no distress could have been made. It frequently happens, that persons enter and occupy at a rent to be fixed in future. In such cases no distress can be made, but an action may be brought for the rent on a *quantum valebat*. It seems to me, therefore, that in the present case the old tenancy was determined, and a new joint tenancy by the plaintiff and Moore created by that which was done under the agreement with the plaintiff's concurrence.

Bayley, J. It is clear, since the passing of the Statute of Frauds, that a subsisting term cannot be surrendered unless by writing or by

operation of law. But if a sole tenant agrees to occupy, and does occupy jointly with another, that puts an end to the former sole tenancy. The case of *Roe* v. *The Archbishop of York* does not apply to this case, for here the agreement connected with the joint occupation by Moore and the plaintiff, made them both tenants and therefore operated as a surrender of the separate tenancy of the latter.

Holroyd, J. I think that an agreement for a fresh lease would not put an end to a former tenancy, unless a new tenancy were actually created. But taking the document in question not to amount to a lease, yet the entry and holding by Moore and the plaintiff together under it, created a new tenancy either from year to year or at will; and that, according to *Mellone* v. *May*, Moore, 636, would terminate the old holding. Perhaps, until a lease was executed, it might not be considered that the two held at the rent mentioned in the agreement, but still it might be a holding under the agreement. For, as was said by my Lord Chief Justice, there might be an occupation on a *quantum valebat* until the execution of the lease, and although no distress for rent could be made, yet still a tenancy would exist. For these reasons it appears to me, that the sole tenancy of the plaintiff had terminated, and that a nonsuit must be entered.

Littledale, J. I am of opinion that the former tenancy of the plaintiff was put an end to by the agreement for a new lease, and the occupation by Moore and the plaintiff jointly in pursuance of that agreement. It is unnecessary to say, whether the instrument in question is or is not a lease, for where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract. But if no rent is paid, still before the execution of a lease the relation of landlord and tenant exists, the parties having entered with a view to a lease and not a purchase. I therefore concur in thinking that a nonsuit must be entered. *Rule absolute.*

DOE d. MURRELL *v.* MILWARD.

Exchequer. 1838.

[*Reported* 3 *M. & W.* 328.]

Ejectment to recover possession of a house and premises at Horsham, in Sussex. The demise was laid on the 27th June, 1837. At the trial before *Littledale*, J., at the last Summer Assizes for the above county, it appeared that the defendants were yearly tenants to the lessor of the plaintiff of the house and premises in question; and being desirous of leaving and going to occupy some premises of their own, in order to determine the tenancy, they gave the lessor of the plaintiff a notice to quit, which was in the following words: —

HORSHAM, 23d December, 1836.

We hereby give you notice that we intend to give and deliver up the possession of the messuage or tenement we now hold of you at Midsummer day next.

WILLIAM MILWARD.
ROBERT MILWARD.

To HENRY MURRELL, Horsham.

The lessor of the plaintiff accepted the notice without making any objection to it, but he gave no assent to it in writing. The tenant of the defendants having refused to quit the premises which they intended to remove to, they felt desirous of continuing in the occupation of the plaintiff's house; and having discovered that their tenancy commenced at Christmas instead of Midsummer, they, previously to Midsummer, gave a fresh notice to quit at the Christmas following. A demand of possession having been made on the expiration of the first notice, the defendants refused to deliver up possession, on the ground that their tenancy expired at Christmas and not at Midsummer; and this ejectment was accordingly brought. It was contended at the trial, on the part of the lessor of the plaintiff, that although the notice might be insufficient as a notice to quit, in case the tenancy expired at Christmas, yet it would operate as a surrender by operation of law of the defendants' interest, it being a note in writing within the meaning of the 3d section of the Statute of Frauds. The learned judge left it to the jury to say whether, on the evidence, the tenancy commenced at Midsummer or at Christmas, and the jury found the latter. The learned judge, however, directed a verdict for the lessor of the plaintiff on the point as to the surrender, but gave the defendants leave to move to enter a nonsuit. *Tyndale* having in Michaelmas Term last obtained a rule accordingly, on the authority of *Johnstone* v. *Huddlestone*, 4 B. & C. 922,

Thesiger and *Ogle* now showed cause.

Andrews, Serjt., and *Tyndale*, contra.

PARKE, B. I am very strongly of opinion that there cannot be a surrender to take place *in futuro*. In *Johnstone* v. *Huddlestone*, it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldenburgh* v. *Peaple* [6 C. & P. 212] was much shaken by the decision of this court in *Weddall* v. *Capes* [1 M. & W. 50]; for, although this precise point is not there determined, yet it is clear that the court were of opinion that the instrument could not operate as a surrender *in futuro*. As to granting a new trial, there appears to have been conflicting evidence as to the time at which the tenancy commenced; but that the jury have determined in favor of the defendant.

ALDERSON, B. There was evidence to show that this was a tenancy commencing at Christmas, and the jury have so found. We cannot

therefore grant a new trial. The lessor of the plaintiff can bring a fresh ejectment, if he pleases.

The other barons concurred.

Rule absolute to enter a nonsuit.[1]

DODD *v.* ACKLOM.

COMMON PLEAS. 1843.

[*Reported* 6 *M. & G.* 672.]

ASSUMPSIT for use and occupation. Plea, *Non assumpsit.*

At the trial before *Erskine*, J., at the sittings for Westminster in last Trinity Term, the following facts were proved in evidence.

On the 7th of October 1842, the plaintiffs, by lease in writing signed by both of them, demised a house to the defendant, at a yearly rent, payable quarterly. The defendant's wife received the key from the wife of the plaintiff Dodd, and the defendant entered into possession, and after communicating with Dodd upon the subject, began to white-wash and paper part of the premises. The defendant afterwards discovered that a considerable amount of rent was in arrear to the superior landlord; that the land-tax and water-rate were also in arrear; and he thereupon remonstrated with Dodd. About Christmas the key of the front door was delivered up by the defendant's wife to Dodd, and accepted by him. It was contended on the part of the plaintiffs that this was not sufficient to constitute a surrender by act and operation of law, under the 29 Car. 2, *c.* 3, § 3, especially as it was not shown that the defendant's wife had authority to give up the key; and that, at any rate, a surrender to one plaintiff would not inure as a surrender to both.

The learned judge told the jury that the plaintiffs were entitled to a verdict, unless the jury thought that the plaintiffs had, by some act, prevented the defendant from having a beneficial occupation of the premises; or unless the tenancy had been put an end to by all parties before any rent became due; and, further, that if the jury thought that the defendant's wife had authority from her husband to deliver up the possession by giving up the key, and had done so, and that the plaintiff Dodd had accepted it, also having authority from the other plaintiff so to do, that would amount to a surrender of the tenancy by act and operation of law, and the defendant would be entitled to a verdict.

The jury having returned a verdict for the defendant,

Byles, Serjt., in last Trinity Term, obtained a rule *nisi* for a new trial upon the ground of misdirection, and also that the verdict was against evidence.

[1] But see *Allen* v. *Jaquish*, 21 Wend. 628 (1839).

Talfourd, Serjt. (with whom was *Thomas*), now showed cause.

Byles, Serjt., in support of the rule.

Tindal, C. J. Two questions arise in this case. First, whether, under the circumstances, there was a surrender of the premises by the tenant by act and operation of law, within the meaning of the Statute of Frauds; and secondly, whether, supposing there was such a surrender, Davies, one of the joint lessors, was affected by that surrender. And I am of opinion, upon the evidence, that there was a sufficient surrender, and that Davies was bound by the acts of Dodd, his co-lessor. There was undoubtedly no formal surrender by deed or note in writing; but it is clear there may be a surrender by act and operation of law, where there is a change of possession. By the old law, before the Statute of Frauds, if a lessee took a new lease from the lessor it would operate as a surrender of the former term, although the second lease were for a shorter period than the first, or were by parol; and the reason is, that the lessee, by taking the second lease, affirms that the lessor is able to make such lease.[1] So, where there has been a change of possession, with the assent of both parties, it amounts to a surrender of the term by act and operation of law.

The present case is not like *Doe d. Huddleston* v. *Johnston* [M'Clel. & Y. 141], where the second tenant was never substituted, nor *Mollett* v. *Brayne* [2 Campb. 103], where the landlord told the tenant that he might go, but that he would hold him to the payment of rent. Here, there is evidence that after a lease in writing had been executed, the tenant finding that the ground-rent and land-tax were due, and that there was a dispute as to the payment of the water-rate, felt a disinclination to continue in possession. I am not prepared to say that if the landlords had known this state of facts, and had concealed them from the tenant, there might not have been an action for deceit by the tenant against the landlords. It is true that the defendant enters into possession, and that he proceeds to paper and whitewash some part of the premises; but some time about Christmas his wife delivers the key of the house to the plaintiff Dodd. Now the first question is, Was that a change of possession? The jury have found there was such a change, by consent of both parties; and that amounts therefore to a surrender by act and operation of law. The key was shown to have been delivered to the plaintiff Dodd; and when a given state of things has been shown to exist, the law will assume that it continues unless a change be shown. The natural presumption, therefore, is that the key remained in Dodd's possession.

One objection that has been taken is, that the defendant's wife could not bind her husband by the delivery of the key. But we must look at all the circumstances of the case. The key was first delivered by the wife of the plaintiff Dodd to the wife of the defendant; and from her

[1] Plowd. 106, 107 a. But there, both Portman, J., and Brambley, C. J., state that it is a surrender *by the course of the common law* (viz. by the act of the parties acting according to the common law), not a surrender *by operation of law*. — Rep.

Dodd afterwards received the key back. I think therefore there is no objection on the ground of the want of authority in the defendant's wife.

Then the last question is, whether the plaintiff Davies is affected by the acts of Dodd. And here we must look to the circumstances again. Davies signs the lease, it is true, but he is then lost sight of. Dodd always acts in the business. The application by the defendant as to the repairs, is made to Dodd. And there are many other circumstances in which Dodd was concerned and not Davies. I think it was properly left to the jury to say whether Dodd was not to conduct the whole business. Upon the whole therefore it appears to me that the case was properly submitted to the jury.

With respect to the evidence, there is no affidavit to negative the receipt of the key by Dodd; and I see no reason to disturb the verdict upon this ground.

I think the rule must be discharged.

COLTMAN, J. I am of the same opinion. Upon the question of surrender by operation of law, there is *prima facie* a good deal of difficulty as to the precise meaning of the term as used in the Statute of Frauds. Probably the expression referred to such surrenders as were then known, and which are mentioned in Plowden.[1] Subsequent cases have gone much further than the old doctrine. In *Thomas* v. *Cook*, 2 B. & A. 119; 2 Stark. N. P. C. 408, it appeared that the plaintiff had originally let the premises to the defendant as tenant from year to year. After the defendant had resided there for some time, he underlet them to one P. commencing at Christmas 1806. At Lady Day 1807, the defendant distrained upon P. for rent in arrear. Rent being then due from the defendant to the plaintiff, the latter gave notice to P. not to pay the rent to the defendant, but to pay it to him; and upon the defendant's refusing to take P.'s bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from the defendant to him, saying that he would not have anything more to do with the defendant: and in the following October, the plaintiff himself distrained upon the goods of P. for rent in arrear. It was held that these circumstances constituted a valid surrender of the defendant's interest by act and operation of law, within the Statute of Frauds. So, in *Grimmaun* v. *Legge*, 8 B. & C. 324; 2 M. & R. 438, it was also decided that where there is an agreement between the landlord and tenant that the latter shall deliver up possession, and possession is delivered up accordingly, that is a surrender by operation of law. In the present case I think there was sufficient evidence of such a surrender. *Mollett* v. *Brayne* and *Doe d. Huddleston* v. *Johnston* are quite distinct from *Grimmaun* v. *Legge*. In *Mollett* v. *Brayne* it was not shown that the landlord took possession. In *Doe d. Huddleston* v. *Johnston* the agreement to put an end to the tenancy, was never carried out. In

[1] In *Falmerden* v. *Sherard*, p. 106. And see Bac. Abr. tit. Leases and Terms for Years (S. 5. — Ed.

the present case the jury have found that the key was delivered up with the intent that the landlord should resume possession; and that amounts to a surrender by operation of law.

Then comes the further question whether Davies was bound by the act of Dodd. Upon this point I have found a little difficulty in making up my mind; but it appears to me upon the whole — the management of the business being left entirely to Dodd — that there was evidence to warrant the jury in inferring that Dodd had authority to act for his co-lessor Davies. That puts the case out of the rule in *Reid* v. *Tucker* [Cro. Eliz. 802], which is applicable only where one joint tenant acts for the other without authority, or where the only authority is that which is to be implied from the relation in which they stand to each other as such joint tenants.

As to the weight of evidence, I am of opinion that the verdict was correct.

Maule, J. I also think this rule must be discharged. As to the evidence, I think it was sufficient to support the verdict. As to the alleged misdirection, I think there was none. This was an action of assumpsit for use and occupation, in which the plaintiffs say that the defendant is indebted to them for the occupation of certain premises. The defendant denies his liability. The question is, whether, on a certain day — namely on the day on which by the original lease the rent would fall due — the defendant was occupying the premises with the consent of the plaintiffs so as to give rise to an implied promise on his part. Now if one of the plaintiffs had put the defendant out of possession, it might be a question whether, it being a joint contract, they could both sue upon it. But supposing there was an authority on the part of Dodd to act for Davies in accepting the key, then there is no doubt that there was a surrender of the premises by operation of law. It seems clear, from all the circumstances, that Dodd, being the managing owner, was satisfied with the authority of Mrs. Acklom to give up the key; and that is quite sufficient against his joint-tenant.

Erskine, J. Having the sanction of the rest of the court for the way in which I left the case to the jury, I shall say nothing as to the law. And as to the verdict, I am by no means dissatisfied with it.

Rule discharged.[1]

[1] See *Phené* v. *Popplewell*, 12 C. B. N. S. 334 (1862); *Oastler* v. *Henderson*, 2 Q. B. Div. 575 (1877); *Milling* v. *Becker*, 96 Pa. 182 (1880).

LYON *v.* REED.

EXCHEQUER. 1844.

[*Reported* 13 *M. & W.* 285.]

PARKE, B.[1] This was a special case argued in Easter Term. It was an action of debt by the plaintiff, as assignee of the reversion of certain houses and rope-walks at Shadwell, holden under a lease from the Dean of St. Paul's against the defendants, who are executors of Shakespeare Reed, deceased. The plaintiff claims from the defendants nineteen years' rent, accrued due between Christmas, 1820, and Christmas, 1839, partly in the lifetime of Shakespeare Reed, who held the premises during his life, and partly since his decease, while the premises were in the possession of the defendants, his executors.

The material facts are as follows: The premises in question are parcel of the possessions of the Dean of St. Paul's, and it appears that, on the 26th of December, 1803, the then dean demised a large estate at Shadwell, including the houses and premises in question, to two persons of the names of Ord and Planta (who were in fact trustees for the Bowes family) for a term of forty years, commencing at Christmas, 1803, and which would, therefore, expire at Christmas, 1843. On the 24th of March, 1808, Ord and Planta made an underlease of the houses and rope-walks in question to Shakespeare Reed for thirty-four years, commencing from Christmas, 1807, so that the term created by this underlease would expire at Christmas, 1841, leaving a reversion of two years in Ord and Planta. The rent sought to be recovered is the rent which accrued due on the underlease between Christmas, 1820, and Christmas, 1839. It appears that, previously to the month of October, 1811, Robert Hartshorn Barber and Francis Charles Parry were appointed by the Court of Chancery trustees for the Bowes family, in the place of Ord and Planta; and by an indenture dated the 3d of October, 1811, indorsed on the lease of 1803, all the property at Shadwell demised by that lease was assigned by Ord and Planta to Barber and Parry, the new trustees. Soon after this assignment, the Bowes family appears to have negotiated with the dean for a renewal of the lease of 1803, and accordingly a new lease was executed by the dean, dated on the 7th of April, 1812, for a term of forty years from Christmas, 1811, and which term would, therefore, endure till Christmas, 1851. Unfortunately this lease, instead of being made to Barber and Parry (the new trustees), in whom the old term (subject to the underlease to Reed) was vested, was made to Ord and Planta, the old trustees; the fact of the change of trustees, and the assignment of the 3d of October, 1811, having at the time escaped observation. In this state of things, a private Act of Parliament was passed, enabling the dean

[1] The opinion only is given.

and his successor for the time being to grant leases of the Shadwell estate to the trustees of the Bowes family for successive terms of ninety-nine years, renewable forever.

The Act, which is intituled "An Act to enable the Dean of St. Paul's, London, to grant a Lease of Messuages, Tenements, Lands, and Hereditaments in the Parish of St. Paul's, Shadwell, in the County of Middlesex, and to enable the Lessees to grant Subleases for building on and repairing that Estate," received the royal assent on the 22d of July, 1812. It begins by reciting the will of Mary Bowes, whereby she bequeathed her leasehold estate at Shadwell, held under the Dean of St. Paul's (being the estate afterwards demised by the leases of 26th December, 1803, and the 7th April, 1812), to Ord and Planta, on certain trusts for the Bowes family. It then recites the lease of the 7th of April, 1812, and after stating that it would, for the reasons therein mentioned, be beneficial for all parties that the dean should be empowered to grant long leases of the Shadwell property, perpetually renewable, and further stating that Ord and Planta were desirous of being discharged from their trust, and that John Osborn and John Burt had agreed to act as trustees in their place; it enacted, that it should be lawful for the dean and his successors for the time being, and he and they are thereby *required*, on a surrender of the existing lease, to demise the Shadwell estate to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years, and at the end of every fifty years to grant a new lease on payment of a nominal fine, with various provisions (not necessary to be stated), for securing to the dean and his successor a proportion of all improved rents to be thereafter obtained. And by the second section of the Act it is enacted, that, immediately on the execution by the dean of the first lease for ninety-nine years to be granted in pursuance of the Act, the lease of the 7th of April, 1812, should become void. It is plain, from the provisions contained in this Act, that the persons by whom it was obtained were not aware, or had forgotten that, in the month of October preceding, Ord and Planta had assigned their interest in the property to Barber and Parry, the new trustees appointed by the Court of Chancery. In pursuance of the Act of Parliament, by an indenture of three parts, dated the 31st day of August, 1812, and made between the dean of the first part, Thomas Bowes (the party beneficially interested for his life) of the second part, and Osborn and Burt of the third part, the dean demised the Shadwell property to Osborn and Burt for a term of ninety-nine years, and the demise is expressed to be made as well in consideration of the surrender of the lease of the 7th of April, 1812, "*being the lease last existing*," as also of the rents and covenants, &c.

Mr. Bowes, and Osborn and Burt, his trustees, appear to have discovered, before the month of January, 1814, the mistake into which they had fallen, and two further deeds were then executed for the purpose of curing the defect. By the former of these deeds, which

bears date the 6th January, 1814, and is made between Barber and Parry of the one part, and the dean of the other part, reciting that, at the time of the granting of the lease of the 7th of April, 1812, the estate and interest created by the original demise of the 20th of December, 1803, was vested in Barber and Parry, and also reciting that the fact of the assignment to them by the deed of the 3d of October, 1811, was not known to the parties by whom the said Act was solicited, it is witnessed, that Barber and Parry did bargain, sell, and surrender to the dean the whole of the said Shadwell estate, to the intent that the term of forty years, created by the lease of the 26th of December, 1803, might be merged in the freehold, and that the dean might execute a new lease to Osborn and Burt according to the said Act. By the other deed, which bears date the 29th of January, 1814, and is made between the dean of the first part, the said Thomas Bowes of the second part, and the said Osborn and Burt, of the third part; the dean, *in consideration of the effectual* surrender of the two prior leases of the 26th of December, 1803, and the 7th of April, 1812, and for the other considerations therein mentioned, demised the Shadwell estate, pursuant to the said Act of Parliament, to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years. The interest of Osborn and Burt, under these two leases to them, has, by various assignments, become vested in the plaintiff; and there is no doubt but that he is entitled to recover the rent in question in this action, if Osborn and Burt would have been so entitled.

Such being the principal facts, we must consider how they bear on the several issues raised by the pleadings. The declaration, after stating the demise from the dean to Ord and Planta in 1803, and the underlease from them to Reed in 1808, goes on to state, that, by the deed of the 3d of October, 1811, Ord and Planta assigned all their interest in the premises to Barber and Parry, and that the dean, being seised of the reversion expectant on the term of forty years so assigned to Barber and Parry, by the indenture of the 31st of August, 1812, demised the premises to Osborn and Burt for a term of ninety-nine years, by virtue whereof they became entitled to the reversion for that term. The declaration then goes on to state that, by the indenture of the 6th of January, 1814, Barber and Parry assigned their interest to the dean, to the intent that he might grant a new lease to Osborn and Burt; and that afterwards, on the 29th day of the same month of January, 1814, the dean, by the indenture of that date, made a new demise of the premises to Osborn and Burt for a fresh term of ninety-nine years, they by the same indenture surrendering the former term created by the demise of the 31st of August, 1812. The declaration then traces the title in the present plaintiff by assignment from Osborn and Burt previously to Christmas, 1820, and so claims title to the rent accrued due after that date.

To this declaration the defendants pleaded six pleas: First, a plea traversing the averment that, at the time of the demise to Osborn and

Burt of the 31st of August, 1812, the dean was seised in fee of the reversion. Secondly, a plea traversing that demise. Thirdly, a plea traversing the assignment by Barber and Parry to the dean, to the intent that he might grant a new lease to Osborn and Burt. Fourthly, a plea traversing the surrender by Osborn and Burt of the first term of ninety-nine years. Fifthly, a special plea stating the indenture of the 7th of April, 1812, whereby Ord and Planta became entitled to the reversion for forty years from Christmas, 1811, and so continued until, up to, and after the execution of the indenture of the 29th of January, 1814. Sixthly, a plea traversing the demise to Osborn and Burt by the indenture of the 29th of January, 1814. Issue was joined on all the pleas except the fifth, and to that the plaintiff replied, that, after the making of the lease of the 7th of April, 1812, and before the lease of the 31st of August, 1812, the private Act of Parliament was passed, authorizing the dean, on the surrender of the existing lease, to grant a lease for ninety-nine years to Osborn and Burt; and the replication then avers that the lease of the 31st of August, 1812, was duly made in pursuance of the Act, and that, at the time when it was made, the lease of the 7th of April, 1812, was duly surrendered. To this the defendants rejoin, traversing the surrender of the lease of the 7th of April, 1812, and on this issue was joined. The second, third, and sixth issues, it will be observed, are mere traverses of the execution of deeds which are found by the special case to have been duly executed; and, as the traverse merely puts in issue the fact of the execution, and not the validity of the deeds or the competency of the parties to make them, the verdict on those issues must certainly be entered for the plaintiff; and so must that on the fourth issue, whereby the defendant traverses the surrender by Osborn and Burt of the first term of ninety-nine years, when the demise of the second term was made to them. It is quite clear that the acceptance of the second demise was of itself a surrender in law of the first, even if no surrender in fact was made. For whom, then, is the verdict on the remaining issues, the first and fifth, to be entered? The issue on the fifth plea is, it will be observed, whether the lease of the 7th of April, 1812, was duly surrendered at the time of the making of the indenture of the 31st August, 1812. And the issue on the first plea is substantially the same; for if the plaintiff succeeds in showing that the indenture of the 7th April, 1812, was duly surrendered as set forth in his declaration, then it follows that the dean was at that time seised of the reversion, and so the plaintiff must succeed on the first issue; if, on the other hand, he fail on the fifth issue, he must also fail on the first.

The real question, therefore, for our consideration is, whether the plaintiff has succeeded in showing that the term of the 7th April was surrendered previously to the execution of the indenture of the 31st of August, 1812. On this subject it was argued by the counsel for the plaintiff, first, that the circumstances of the case warranted the conclusion that there was an actual surrender in fact; and if that be not

so, then, secondly, that they prove conclusively a surrender in point of law.

We will consider each of these propositions separately. And first, as to a surrender in fact. The subject-matter of the lease of the 7th April, 1812, was, it must be observed, a reversion; a matter, therefore, lying in grant, and not in livery, and of which, therefore, there could be no valid surrender in fact otherwise than by deed; and what the plaintiff must make out, therefore, on this part of his case is, that, before the execution of the first lease for ninety-nine years, Ord and Planta, by some deed not now forthcoming, assigned or surrendered to the dean the interest which they had acquired under the lease of the 7th of April. But what is there to warrant us in holding that any such deed was ever executed? *Prima facie* a person setting up a deed in support of his title is bound to produce it. But undoubtedly this general obligation admits of many exceptions. Where there has been long enjoyment of any right, which could have had no lawful origin except by deed, then, in favor of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption. Has there, then, in this case, been any such enjoyment as may render it unnecessary to show the deed on which it has been founded? The only fact as to enjoyment stated in this case has precisely an opposite tendency; it is stated, so far as relates to the property, the rent of which forms the subject of this action, namely the houses, &c., underlet to Reed, that no rent has ever been paid; and therefore, as to that portion of the property included in the lease of April, 1812, there has certainly been no enjoyment inconsistent with the hypothesis that that lease was not surrendered.

The circumstances on which the plaintiff mainly relies as establishing the fact of a surrender by deed, are the statements in the two leases to Osborn and Burt, that they were made in consideration, *inter alia*, of the surrender of the lease of the 7th April, and the fact of that lease being found among the dean's instruments of title. These circumstances, however, appear to us to be entitled to very little weight. The ordinary course pursued on the renewal of a lease is for the lessee to deliver up the old lease on receiving the new one, and the new lease usually states that it is made in consideration of the surrender of the old one. No surrender by deed is necessary, where, as is commonly the case, the former lessee takes the new lease, and all which is ordinarily done to warrant the statement of the surrender of the old lease as part of the consideration for granting the new one, is, that the old lease itself, *the parchment on which it is engrossed*, is delivered up. Such surrender affords strong evidence that the new lease has been accepted by the old tenant, and such acceptance undoubtedly operates as a surrender by operation of law, and so both parties get all which they require. We collect from the documents that this was the course pursued on occasion of making the lease of the 26th of December, 1803, and the lease of the 7th of April, 1812; and we see nothing

whatever to warrant the conclusion that anything else was done on occasion of making the lease to Osborn and Burt.

Where a surrender by deed was understood by the parties to be necessary, as it was with reference to the term assigned to Barber and Parry, there it was regularly made, and the deed of surrender was indorsed on the lease itself. There is no reason for supposing that the same course would not have been pursued as to the lease of April, 1812, if the parties had considered it necessary. If any surrender had been made, no doubt the deed would have been found with the other muniments of title. No such deed of surrender is forthcoming, and we see nothing to justify us in presuming that any such deed ever existed. We may add, that the statement in the new lease, that the old one had been surrendered, cannot certainly of itself afford any evidence against the present defendants, who are altogether strangers to the deed in which those statements occur.

It remains to consider whether, although there may have been no surrender in fact, the circumstances of the case will warrant us in holding that there was a surrender by act and operation of law. On the part of the plaintiff it is contended, that there is sufficient to justify us in coming to such a conclusion, for it is said, the fact of the lease of the 7th of April, 1812, being found in the possession of the dean, even if it does not go the length of establishing a surrender by deed, yet furnishes very strong evidence to show, that the new lease granted to Osborn and Burt was made with the consent of Ord and Planta, the lessees under the deed of the 7th of April, 1812. And this, it is contended, on the authority of *Thomas* v. *Cook*, 2 B. & Ald. 119, and *Walker* v. *Richardson*, 2 M. & W. 882, is sufficient to cause a surrender by operation of law.

In order to ascertain how far those two cases can be relied on as authorities, we must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease: and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant

the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor.

It is needless to multiply examples: all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus, in the cases which we have adverted to of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties. These principles are all clearly deducible from the cases and doctrine laid down in Rolle, and collected in Viner's Abridgment, tit. "Surrender," F. and G., and in Comyns' Dig., tit. "Surrender," T. and I. 2, and the authorities there referred to. But, in all these cases, it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner is not sufficient. Brooke, in his Abridgment, tit. "Surrender," pl. 48, questions the doctrine of Frowike, C. J., who says: "If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender," and says he believes it is not law; and the contrary was expressly decided in the case of *Swift* v. *Heath*, Carthew, 110, where it was held, that the consent of the tenant for life to the remainderman making a feoffment to a stranger, did not amount to a surrender of the estate for life, and to the same effect are the authorities in Viner's Abr., "Surrender," F. 3 and 4.

If we apply these principles to the case now before us, it will be seen that they do not at all warrant the conclusion, that there was a surrender of the lease of the 7th of April, 1812, by act and operation of law. Even adopting, as we do, the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question affords cogent evidence of their having consented to the making of the new lease, still there is no estoppel in such a case. It is an act which, like any other ordinary act *in pais*, is capable of being explained, and its effect must therefore depend, not on any legal consequence necessarily attaching on and arising out of the act itself, but on the intention of the parties. Before the Statute of Frauds, the tenant in possession of a corporeal hereditament might surrender his term by parol, and therefore the circumstance of his delivering up his lease to the lessor might afford

strong evidence of a surrender in fact; but certainly could not, on the principles to be gathered from the authorities, amount to a surrender by operation of law, which does not depend on intention at all. On all these grounds, we are of opinion that there was in this case no surrender by operation of law, and we should have considered the case as quite clear, had it not been for some modern cases, to which we must now advert.

The first case, we believe, in which any intimation is given that there could be a surrender by act and operation of law by a demise from the reversioner to a stranger with the consent of the lessee, is that of *Stone* v. *Whiting*, 2 Stark. 236, in which Holroyd, J., intimates his opinion that there could; but there was no decision, and he reserved the point. This was followed soon afterwards by *Thomas* v. *Cook*, 2 Stark. 408; 2 B. & Ald. 119. That was an action of debt by a landlord against his tenant from year to year, under a parol demise. The defence was, that the defendant Cook, the tenant, had put another person (Parkes) in possession, and that Thomas, the plaintiff, had, with the assent of Cook, the defendant, accepted Parkes as his tenant, and that so the tenancy of Cook had been determined. The Court of King's Bench held, that the tenancy was determined by act and operation of law.

It is matter of great regret that a case involving a question of so much importance and nicety, should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested, which would have led the court to pause before they came to the decision at which they arrived. Mr. Justice Bayley, in his judgment says, the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit, an observation which forcibly shows the uncertainty which the doctrine is calculated to create.

The acts *in pais* which bind parties *by way of estoppel* are but few, and are pointed out by Lord Coke, Co. Lit. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery*, *entry*, *acceptance of an estate*, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed, if they are liable to be affected by such accidents as those alluded to by Mr. Justice Bayley. If the doctrine of *Thomas* v. *Cook* should be extended, it may very much affect titles to long terms of years, mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences.

The case of *Thomas* v. *Cook* has been followed by others, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision, that in such a case there was a surrender by act and operation of law, we should probably not have felt ourselves justified in overruling it. And, perhaps, the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles.

If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, and of which demises may therefore be made by parol, or writing, and where there is an open and notorious shifting of the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal hereditaments are disposed of, which pass only by deed. With respect to these, we think we ought to abide by the ancient rules of the common law, which have not been broken in upon by any modern decision; for that of *Walker* v. *Richardson*, 2 M. & W. 882, which has been much relied on in argument, is not to be considered as any authority in this respect, inasmuch as the distinction that the right to tolls lay in grant was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself. Moreover, *according to the report of that case*, it would seem that the new lessees had, before they accepted their lease, become entitled to the old lease by an actual assignment from the old lessee. If this were so, then there could, of course, be no doubt but that the old lease was destroyed by the grant and acceptance of the new one. It is, however, right to say, that we believe this statement to have crept into the report inadvertently, and that there was not, in fact, any such assignment. The result of our anxious consideration of this case is, that the verdict on the issues on the first plea and on the rejoinder to the replication to the fifth plea, must be entered for the defendants, and as those pleas go to the whole cause of action, the judgment must be for them.

In the case, as it was originally stated, it did not appear that there had been any change of dean since the original demise in 1803. We desired to have the case amended on this point, in order that the fact might appear, if the case should be turned into a special verdict. For during the incumbency of the dean, who made the lease for ninety-nine years, that lease would be good independently of the private Act, and as the immediate reversion, on which the defendants' lease depended, was assigned to the dean by Barber and Parry previously to the demise

of the 29th of January, 1814, that reversion undoubtedly passed to Osborn and Burt, and would enable them, or the plaintiff claiming under them, to sue for the rent so long as the estate of the same dean continued, whether the lease for ninety-nine years was or was not warranted by the Act; and so the plaintiff might possibly have been entitled to judgment *non obstante veredicto*. It appears by the case as now amended, that the Bishop of Lincoln who was the dean granting the leases of ninety-nine years, ceased to be dean, and was succeeded by Dr. Van Mildert in October, 1820, before any part of the rent sought to be recovered in this action had accrued due, and therefore no question on this head arises.

Neither will the second private Act stated in the case aid the plaintiff. It appears that, in 1820, the difficulties in which the parties had involved themselves by neglecting to get a proper surrender of the lease of the 7th of April, 1812, was brought under the consideration of the Court of Chancery, in a suit there pending relative to the affairs of the Bowes family. Master Cox, by his report of the 15th of February, 1820, stated, that he was of opinion that both the leases of ninety-nine years were void, the first because it was made when the original term of forty years was outstanding in Barber and Parry, and the latter, because at the time of its creation the lease of the 7th of April, 1812, was still outstanding, thus showing clearly his opinion, that nothing had happened to cause a surrender of that lease by operation of law; and he recommended that an Act of Parliament should be obtained to remedy the defect. His report was afterwards confirmed, and the second Act stated in the case was accordingly obtained. That Act received the royal assent on the 15th of July, 1820, and it was thereby enacted, that the lease of the 29th of January, 1814, should be valid to all intents and purposes: and further, that immediately after the passing of the Act, the leases of the 26th of December, 1803, the 7th of April, 1812, and the 31st of August, 1812, should be void to all intents and purposes. The effect of this was to destroy altogether the reversion in respect of which the rent now sought to be recovered was payable, and it may therefore well be doubted whether, even if all the issues had been found for the plaintiff, he could have had judgment. It is, however, sufficient for us to say that the Act certainly does not entitle the plaintiff to anything which he would not have been entitled to if no such Act had passed. More especially when it is considered, that, by the saving clause, the defendants are excepted out of the operation of the Act. The result therefore is, that the verdict on the first and fifth issues must be entered for the defendant, and on the other issues for the plaintiff, and the judgment will be for the defendant.

Judgment for the defendant.

Watson, for the plaintiff.
Erle, for the defendants.

NICKELLS *v.* ATHERSTONE.

QUEEN'S BENCH. 1847.

[*Reported* 10 *Q. B.* 944.]

DEBT on a demise of rooms &c., by plaintiff to defendant for three years from March 1st, 1844, at the yearly rent of £100, payable quarterly in advance; averment, that defendant entered, and was possessed until 1st September, 1845.

Pleas. 1. Traversing the demise. 2. Eviction by plaintiff. 3. Surrender. Traverses of pleas two and three.

On the trial, before *Wightman*, J., at the London sittings after Easter Term, 1846, the following appeared to be the material facts. The rooms were let by plaintiff to defendant under a memorandum of agreement dated 26th February, 1844, on the terms specified in the declaration. The defendant entered, and paid rent for the first two quarters, beginning respectively March 1st and June 1st, 1844. In August, 1844, the defendant removed his property from the rooms and left them, and applied to the plaintiff to take them off his hands. The plaintiff refused. The defendant then asked the plaintiff to let the rooms for him; and the plaintiff said he would try to do so. On 3d September, 1844, the defendant being then absent, the plaintiff applied to his daughter for the rent due on 1st September. In reply, the following letter was written by the defendant to the plaintiff.

EDINBURGH, 11th September, 1844.

SIR. — I heard from my daughter that you expressed your intention to take legal measures against me unless the ensuing quarter rent were paid on the very day commencing the quarter. I consider such a step would be harsh; and under present circumstances it would be utterly useless. It will probably be six months before I can finally leave Scotland, as the greater part of my business connection lies in this country. I trust, however, that you may be able to let the rooms to some other person, and on better terms. E. ATHERSTONE.

On 29th September, 1844, the plaintiff, without any further communication with the defendant, let the room in question, together with some others, to a Mr. Bullock, for three years from that day, at £120 a year, payable quarterly in advance. Mr. Bullock paid the first two quarters, but subsequently became insolvent. The present action was then brought, claiming from the defendant the four quarters' rent from September 1st, 1844, to September 1st, 1845, under the agreement of February, 1844; but credit was given to the defendant for the first two quarters' rent, which the plaintiff had received from Bullock.

Wightman J., left it to the jury to say whether the plaintiff agreed to the terms offered by the defendant in his letter of 11th September, and accepted Bullock as his tenant in substitution and discharge of the

defendant. The jury found that the plaintiff did accept Bullock as his tenant in discharge of the defendant. Verdict for the plaintiff, under the direction of the learned judge, on the first issue, for the defendant on the other issues, with leave to the plaintiff to move to enter a verdict for himself for £50, on either or both the other issues.

A rule *nisi* having been accordingly obtained,

Bramwell showed cause.[1]

Watson and *Hugh Hill*, contra. *Cur. adv. vult.*

Lord Denman, C. J., now delivered judgment.

In this case, the defendant being the lessee in possession of the premises, the plaintiff, his landlord, with his consent, let them to a new tenant, and put him in possession, and discharged the defendant from his liability as tenant.

The judge who tried the case held that these facts constituted a surrender by operation of law, and, therefore, a defence against the plaintiff's claim for rent. The correctness of that holding has been brought into question before us in consequence of the opinion expressed by the Court of Exchequer in *Lyon* v. *Reed*, 13 M. & W. 285, 305–310; but we are of opinion that it is correct. If the expression "surrender by operation of law" be properly "applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued," it appears to us to be properly applied to the present. As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant, the owner of the particular estate in question, is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter.

If the defendant cannot technically be said to be estopped from disputing the validity of the estate of the new tenant, still, according to the doctrine of *Pickard* v. *Sears*, 6 A. & E. 469, he would be precluded from denying it with effect; and the result is nearly the same as an estoppel. If an act which anciently really was, in contemplation of law, and has always continued to be, an act of "notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like" (*Lyon* v. *Reed*, 13 M. & W. 309), be required as requisite for a surrender by operation of law, and if the acts of the three parties are regarded together, this requisite is here found. Indeed the notoriety is essentially greater than that which accompanies a parol redemise between the same landlord and tenant, which is a clear surrender by operation of law. In the present case

[1] Before Lord Denman, C. J., Patteson, Wightman, and Erle, JJ.

three are concerned, and there is an actual change of possession; in the other, two are concerned, and there is no change of possession. This surrender by operation of law has been judicially recognized in each of the superior courts: *Matthews* v. *Sawell*, 8 Taunt. 270; *Thomas* v. *Cook*, 2 B. & Ald. 119; *Walker* v. *Richardson*, 2 M. & W. 882; *Rees* v. *Williams*, 2 C. M. & R. 581, s. c. Tyr. & G. 23; and held valid at Nisi Prius in *Stone* v. *Whiting*, 2 Stark. N. P. C. 235, and many subsequent cases. When the decisions on a point are numerous and uniform, and carry into effect the lawful intentions of the parties according to the truth, and are opposed by no principle, the law on the point ought not to be considered doubtful because the reported decisions are only of modern date, as the fact that the reports on the point do not begin till lately may arise from there being no question on the point in earlier times. Indeed, in 1809, it seems probable that a restoration of the possession to the landlord and a discharge of the tenant by him was considered a surrender by operation of law. The defence in *Mollett* v. *Brayne*, 2 Campb. 103, was shaped on that principle; but, as the evidence failed to show a change of possession by mutual consent of landlord and tenant, the defence failed. In *Whitehead* v. *Clifford*, 5 Taunt. 518, where there was such change of possession by mutual consent, the defence to a claim for use and occupation succeeded; and the court distinguished the case from *Mollett* v. *Brayne*, for that reason.

Where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved, as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence. Although we do not assent to the observations upon the line of cases, from *Thomas* v. *Cook*, downwards, in the learned and able judgment given in *Lyon* v. *Reed*, 13 M. & W. 285, we wish to express our entire concurrence in the decision of that case. The question there was not upon the estate of the tenant in possession of the premises, but upon the title of the plaintiff as assignee of the reversion: whether a lease of the reversion, granted to Ord and Planta in 1812, for ninety-nine years, could be presumed to be surrendered, from the fact that such lease was found among the deeds of the tenant in fee, who had granted in 1814 a term in the reversion to Osborn and Burt, through whom the plaintiff claimed. There was no change in the possession of the land. No actual change in the possession of the reversion could be made apparent; and the facts stated lead to the conclusion that Ord and Planta did not know of the demise to Osborn and Burt; but the probability is, that the term in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease.

As the defendant is entitled to our judgment on this point, it is not necessary to consider the effect of his letter as evidence of a surrender.

Rule discharged.

SCHIEFFELIN *v.* CARPENTER.

SUPREME COURT OF JUDICATURE OF NEW YORK. 1836.

[*Reported* 15 *Wend.* 400.]

THIS was an action of *covenant*, tried at the New York Circuit in April, 1834, before the Hon. *Ogden Edwards*, one of the circuit judges.

The plaintiff declared on a lease under seal, made by him to Edmund T. Carpenter, bearing date 1st April, 1829, demising a dwelling house and lot of ground of 5½ acres, situate in the twelfth ward of the city of New York, for the term of *six years*, subject to an *annual rent* of $325, to be paid quarterly. The lease was a tripartite indenture, Daniel S. Hawkhurst and Daniel Carpenter being parties thereto, and uniting with the tenant in the covenants to be performed on his part: and they were joined as defendants in the suit with the tenant. The defendants, amongst other things, *covenanted* for the payment of the rent; that the tenant should, *during the term*, keep the dwelling house, fences, and every part of the demised premises in good condition and repair, and, at the expiration of the term, yield them up in like good repair; that he would not remove, injure or destroy any root, plant, bush or tree growing on the premises, or suffer the same to be done; that he would not underlet or assign the premises, either directly or by operation of law, without the written consent of the landlord; and that during the term, the dwelling-house should not be occupied as a public house, inn or tavern, without the like written consent. The plaintiff *assigned*, *as breaches* of the covenants: 1. That on the 1st July, 1833, there was one year's rent in arrear and unpaid; 2. That on the 1st January, 1831, the tenant permitted the dwelling-house and fences, &c., to fall into bad condition, and to become ruinous and to decay for the want of necessary repairs, and so permitted them to remain until the commencement of the suit; 3. That on the 1st January, 1831, he suffered fruit trees, gooseberry bushes, asparagus roots, and ornamental flowering plants growing on the premises to be lopped, uprooted, removed and destroyed by persons and animals; 4. That from 1st November, 1832, until 1st June, 1833, the dwelling house was used and occupied as a *public house*, without the consent of the plaintiff. The defendants pleaded the *general issue*, and gave notice of various matters to be proved on the trial.

On the trial of the cause, the plaintiff claimed to recover the *rent* of a quarter of a year, ending 1st July, 1833, and *damages* for breaches of the covenants to keep the premises in repair, and not to injure them, &c. The plaintiff proved that the premises were in good repair at the date of the lease, and when the tenant went in possession: and that in February, 1833, the dwelling house was in a ruinous state, the fences

prostrated, and the garden wholly destroyed, and that the expense of putting the premises in repair would be between $100 and $500. He also proved that the premises had been occupied for a year by two men of the name of Wood and Matthews, who were railroad contractors, and had many persons in their employ who resided on the premises. The defendant *offered to prove* that the plaintiff held the demised premises only *in right of his wife*, and insisted that inasmuch as an action of *waste* might be brought in the name of the *husband and wife* in the character of *reversioners*, the claim of damages for injury to the demised premises ought not to be sustained in the present suit: the evidence was rejected by the judge. The defendants also *offered to prove* that in the autumn of 1831, an agreement was entered into between the plaintiff, the defendant Edmund T. Carpenter and two persons of the names of Mills and Owen, that Carpenter should quit and surrender up the premises to the plaintiff, that the lease declared on should be delivered up and cancelled, and a new lease of the premises should be executed by the plaintiff to Mills and Owens for the term of eight or ten years. That in pursuance of such agreement, Carpenter, in the autumn of 1831, surrendered up the premises to the plaintiff, and paid all the rent then due to the plaintiff, and Mills and Owen took possession of the premises and occupied the same pursuant to such agreement as tenants to the plaintiff, who accepted them as such, and received rent from them. That Mills and Owen occupied the premises until the autumn of 1832, when they left, and were succeeded in the possession by Wood and Matthews, to whom also the premises were let by the plaintiff, and from whom he also received rent: these facts the defendants offered to establish by *parol proof*. The counsel for the plaintiff objected that parol evidence of the alleged agreement or *surrender* of the lease was inadmissible; and also that the evidence, if intended to be urged in discharge of the covenants, ought not to be received, for the reason that a covenant cannot be discharged by parol *before* breach. The judge sustained the objection. The defendants then proved that Mills and Owen went into possession of the premises on the 1st November, 1831, and that previous to their entry, Edmund T. Carpenter (the tenant) put the premises in as good repair as they were in when he entered; they were thus repaired, because Mills and Owen were to take possession. The plaintiff, on being spoken to on the subject, said that he was satisfied with the repairs, if Mills and Owen were satisfied. It was also proved, that after Mills and Owen quit the premises, they were occupied by Wood and Matthews, who had a large number of men in their employment as laborers on a railroad and housed on the premises. Wood and Matthews were in possession six months, and paid rent to the plaintiff.

The counsel for the defendants insisted that the plaintiff was not entitled to recover in this action more than *nominal damages* for the breach of the covenant to keep the premises in repair, and for the injuries done to the premises, as the tenant might put the premises in

complete repair before the end of the term, and if he did so the plaintiff would have no cause of complaint; if he did not do so, then the plaintiff would be entitled to bring his action, and to recover damages, and requested the judge so to charge the jury. The judge declined to do so, and, on the contrary, charged the jury that the plaintiff was entitled to his verdict for one quarter's rent, (which was admitted to be all that was due at the bringing of the suit;) and, further, that they were not bound to limit their verdict on the covenant of repairs to *nominal damages*, but might give such sum as, under all the circumstances, they should consider the plaintiff entitled to recover, provided they were satisfied that the defendants had violated their covenants. The jury found a verdict for the plaintiff with $181.25 damages. The defendants ask for a new trial. The cause was submitted on written arguments.

E. Morrill and *S. Sherwood*, for the defendants.

C. O'Conner, for the plaintiff.

By the Court. (Nelson, J.) This case has been elaborately argued upon paper by the respective counsel, and all the authorities and principles bearing upon the points disputed, have been referred to and examined; and were it not for some recent cases in the English courts, that are very confidently urged by the defendants' counsel, it seems to me there would be but little difficulty in disposing of the case. A surrender is defined to be a yielding up of an estate for life or years to him who hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement. Comyn's Landlord and Tenant, 337; 2 Co. Lit. 551; 4 Cruise, 155, 4 Bacon's Abr. 209; Shep. Touch. 300, 307. Before the Statute of Frauds and Perjuries, any form of words without writing, whereby an intention appeared to surrender up the possession of the premises to the lessor or reversioner, was sufficient for that purpose. This was called a surrender in *fact*. There was also a surrender in *law*. It was effected by the acceptance of a new lease of the premises from the lessor, for the whole or a part of the time embraced in the former one, because it necessarily implied a determination and surrender of that lease; otherwise the lessor would be unable to make the second, or the lessee to enjoy it, and it was therefore but reasonable to presume both parties intended to waive and relinquish the benefit of the first one. The second lease, before the Statute referred to, of course need not have been in writing to operate an effectual surrender of the first one. The Statute of 29 Car. enacted "that all leases, estates, interests of freehold or terms of years, or any uncertain interests of, in, to or out of any lands, &c., *made* or *created* by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only," &c., excepting leases not exceeding the term of three years from the making thereof. And also, "no leases, estates or interest either of freehold or term of years, or any uncertain interest, &c., of, in, to or out of any messuages, &c., shall be assigned, *granted* or *surrendered*, unless by deed or note, in writing, or *operation of*

law." Our Statute (2 R. S. 134, § 6) provides that "no estate or interest in lands, other than leases for a term not exceeding one year, &c., shall hereafter be created, granted, assigned, *surrendered*, &c., unless *by act or operation of law*, or by deed or conveyance in writing," &c., § 8. "Every contract for the leasing for a longer period than one year, &c., shall be void," unless in writing. Since these Statutes, a parol lease in England for more than three years, and in this State for more than one, is entirely void; though if the tenant enters into possession, he shall be deemed a tenant at will, and for the purpose of notice to quit, from year to year, and notwithstanding the lease be void, it may regulate the terms of holding as to rent, time to quit, &c. 5 T. R. 471; Comyn's L. & T. 8; Woodf. 14, 15; 4 Cow. 350; 7 Id. 751. But as a lease for the purposes for which it was given, it is considered wholly void. It is, however, conclusively settled by authority, that the second lease must be a valid one, so as to convey, the interest it professes to convey, to the lessee, and also to bind him to the performance of the covenant or agreement in favor of the lessor, in order to operate as an effectual surrender of the first one. 3 Burr. 1807; 4 Id. 1980, 2210; 6 East, 86; Comyn's Dig. tit. Estate, G. 13; 4 Bac. Abr. 215. Without this, the reason before given for the *implied surrender* would fail, and the intent of the parties be altogether defeated. Instead of being but a surrender of the first lease, it would be a surrender of the whole estate and interest in the premises, and a virtual determination of the existence of any tenancy. Now the ground upon which the surrender in this case is mainly argued is, not that a new lease was given to the original lessee, but that it was given to Mills and Owen with his consent, for the period of eight or ten years. Assuming this, amounts to the same as if given to Carpenter; it is impossible to maintain that any valid lease has been proved in the case, or any lease whatever for a definite period. The most that was offered to be proved was, that Mills and Owen went into possession with the consent of the defendants, under a parol agreement for a lease for eight or ten years; and if it be viewed as an agreement for a lease, or as a virtual lease for that time, it is void under the Statute, and could not be enforced by either of the parties. An implied tenancy at will only was created, which enabled Mills and Owen to hold from year to year, for the purpose of notice to quit, but which they could terminate at any moment they pleased. The agreement and entry in pursuance of it conferred no rights upon the plaintiff, further than to recover his rent while they continued to occupy, and perhaps a quarter's rent, if they abandoned the occupation after the commencement of a quarter and before its termination.

Suppose this agreement had been made with the original tenant, and the defendants can claim no more from it as offered to be proved, could it be contended that it operated as a virtual surrender of the lease for six years, and that the plaintiff could dispossess the tenant on giving six months' notice to quit? This would be the consequence of the

doctrine urged in the defence. The tenant would become a mere tenant at will. The authorities already referred to clearly establish that the second lease, to have the effect claimed, must pass the interest in the premises according to the contract, or in other words, carry into legal effect the intent of the parties executing it. 3 Burr. 1807; 4 Id. 1980, 2210; Comyn's Dig. tit. Estate, 9, 12; 6 East, 661; 6 Wendell, 569; 1 Saund. 236, b. n. It is stated by Baron Gilbert, 4 Bacon's Abr. 210, that since the Statute of Frauds the new lease must be in writing in order to operate as an implied surrender of the old one, for it is then of equal notoriety with a surrender in writing. This position is also adopted by Serjeant Williams, in his notes upon the case of *Thursby* v. *Plant*, 1 Saund. 236, n. b. But as surrenders by operation of law are expressly excepted out of the Statute, as a necessary consequence they are left as at common law; and there it is clear it need not be in writing to have the effect to surrender the old one, even if by deed. 2 Starkie's Ev. 342; 20 Viner, 143, L. pl. 1, n.; 1 Saunders, 236, n. c. I am inclined therefore to think that a valid parol lease, since the Statute, might produce a surrender in law within the reason and principle upon which this doctrine is founded. The true rule seems to be that laid down by Mr. Starkie, 2 Starkie's Ev. 342, as follows: the taking a new lease by parol is by operation of law a surrender of the old one, although it be by deed, provided it be a good one, and pass an interest according to the contract and intention of the parties; for otherwise the acceptance of it is no implied surrender of the old one.

If the first lease in this case has not been surrendered, then there is no ground of defence against the action upon the express covenants contained in it, even if we should concede a legal assignment from the tenant to Mills and Owen, and the acceptance of them expressly or impliedly by the plaintiff. 4 T. R. 98, 100; 1 Saund. 241, n. 5; Woodf. 278; Cro. Car. 188; Comyns's Land. and Tenant. 275, and cases there cited. But the plaintiff stipulated against assignment or underletting unless permission was given in writing, and a parol license is therefore inoperative. 2 T. R. 425; 3 Id. 590; 3 Madd. 218; Platt on Cov. 427. This clause in a lease would be nugatory, if courts should allow parol evidence to control in the matter. Besides, a parol *assignment* is void under the Statute of Frauds. The case of *Thomas* v. *Cook*, 2 Starkie's R. 408, is supposed to have a strong bearing upon this one. In that case there was a *parol lease* from *year to year* to Cook, who underlet to Parkes. The rent being in arrear, Thomas distrained upon him, and he paid it by a bill of exchange: on receiving which he declared he would have nothing more to do with Cook. Afterwards, however, he brought his action against him for rent then due. For the plaintiff it was insisted that there was no surrender within the Statute of Frauds. Abbott, C. J., left it to the jury to say, whether the plaintiff had not accepted Parkes as his tenant, with the assent of Cook; and the jury finding in the affirmative, the plaintiff was nonsuited. The court at the ensuing term, when the case was moved, were

of opinion there was a surrender by operation of law. They say if a lessee assign and the lessor accept the assignee of the lessee as his tenant, *that* in point of law puts an end to the privity of estate, and an action of debt cannot be brought to recover the rent. That I admit to be true, but if the lease had been in writing, according to the cases above cited, a suit might still be maintained upon the *express covenant in it*, though the privity of estate was gone. Besides, the assignment was void as such under the Statute of Frauds. 1 Campb. 318; 5 Bing. 25; Comyn's Land. & Ten. 55, and cases there cited; Woodf. 277. Again, the court say it is a rule of law, that the acceptance of a subsequent lease by parol operates as a surrender of a former lease by deed. That is true under the circumstances we have before endeavored to explain, and is undoubtedly the legal ground upon which that case may be maintained. The case sufficiently shows that the implied parol demise to Parkes was a valid one to the extent intended by both parties; the one to Cook was a lease from year to year, and the acceptance of Parkes, as tenant in his place, impliedly gave him the same tenure and term; no writing was necessary for that purpose. This is the ground upon which the case is said to stand by the court, in commenting upon it in a subsequent term. 4 Barn. & Cres. 922.

In the case of *Grimman* v. *Legge*, 8 Barn. & Cres. 324, the lease was by parol for *one year*, for the first and second floor of a house; a dispute having arisen before the end of the year, the tenant said she would quit. The landlord said he would be glad to get rid of her. She accordingly left the premises, and possession was taken by him. The facts were submitted to the jury, to presume a rescindment of the original contract between the parties. The case of *Stone* v. *Whiting*, 2 Starkie, 235, is precisely like the case of *Thomas* v. *Cook*, and stands upon the same principle. In the case of *Whitehead* v. *Clifford*, 5 Taunt. 518, the lease was by parol from year to year, and stands upon the footing of *Grimman* v. *Legge*. In the case of *Hamerton* v. *Stead*, 3 Barn. & Cres. 478, a tenant from *year to year* entered into an agreement in writing for a lease to him and another, and from that time both occupied. It was held that the new agreement, coupled with the joint occupation, determined the former tenancy, and operated as a surrender in law, though the lease contracted for was never granted. If the new agreement and occupation were viewed as a tenancy from year to year, which was of equal tenure with the first lease, there was at least no hardship in this decision. The judges obviously were somewhat embarrassed in their endeavors to place the case upon principle, and some of their observations conflict with the case in 6 East, 86, which they admitted to be good law. The first case was by parol from year to year, and might well have been put upon the footing of the cases to which I have referred, where the facts were submitted to the jury to find the first contract rescinded.

The law seems to be well settled, that under a *covenant to repair* like the one in question, the landlord need not wait till the expiration

of the term before bringing an action for the breach, under an idea that the tenant may, before he leaves the premises, put them in good condition. 1 Barn. & Ald. 584; 2 Ld. Raym. 803, 1125; 1 Salk. 141; Platt on Cov. 289; Comyn's Land. & Ten. 210. If the covenant was only to leave the premises in as good a condition as the tenant found them, it seems an action would not lie till the end of the term. Shep. Touch. 173; Platt on Cov. 289.

The defendants cannot question, in this action, the title of the landlord. The action is upon an express covenant between the parties, and the suit, if sustained at all, must be by the plaintiff alone.

New trial denied.

AUER *v.* PENN.

Supreme Court of Pennsylvania. 1882.

[*Reported* 99 *Pa.* 370.]

January 17th, 1882. Before Sharswood, C. J., Mercur, Gordon, Paxson, Trunkey and Sterrett, JJ. Green, J., absent.

Error to the Court of Common Pleas, No. 1, of Philadelphia County: of July Term, 1881, No. 18.

Covenant, by Joseph Penn against John Auer, upon a contract of suretyship annexed to a lease. Upon a former writ of error, a judgment entered for plaintiff for want of a sufficient affidavit of defence was reversed, and a *procedendo* awarded: see 11 Norris, 444.

On the trial, before *Biddle*, J., the following facts appeared: On October 15th, 1875, the plaintiff leased a certain house to one Jacob Brown, for the term of five years, at the yearly rent of $360, payable in equal monthly payments of $30 each. The lease contained the usual covenants on the part of the lessee to pay the rent as due, &c. At the foot of the lease was the agreement of suretyship, signed and sealed by the defendant, John Auer, whereby he covenanted that the lessee should faithfully perform all the covenants in the lease on his part to be performed, otherwise immediate recourse may be had against the surety without any prior proceedings against the lessee.

The lessee entered, paid his rent regularly to January, 1877, and moved out, without notice to his landlord, on February 13th, 1877, because, as he alleged, of defective drainage; after removal he took the keys to the landlord's agent, J. McGeogh. McGeogh testified that he declined to receive them, and stated that he would hold his surety for the rent, whereupon Brown threw them on the floor and went out. Brown testified that McGeogh took the keys, saying it was all right, but he admitted that McGeogh said he would hold John Auer, the surety, for the rent.

McGeogh sent to Auer the following letters on the days of their date.

PHILADELPHIA, February 17th, 1877.
Office 2228 North Fifth Street.

JOHN AUER, Esq. Dear Sir: The rent of No. 1836 Germantown Avenue was due on the 15th instant, and I would like you would call up and pay it. Brown, the tenant for whom you are security, having removed, of course we will have to hold you for the rent.

Yours respectfully,
J. McGEOGH.

February 21st, 1877.

JOHN AUER, Esq. Dear Sir: The tenant of 1836 Germantown Avenue having removed, and as under the lease you are security, I shall look to you for the payment of the rent. If you desire it, I shall place a bill on the house and rent it for you; but in no case will we release you until the expiration of the lease. You will take notice that unless I hear from you in this matter within a few days, I shall proceed to rent the house at your risk, holding you, of course, for the rent until the expiration of the lease. Yours, respectfully,

JAMES McGEOGH,
Agent for Jos. Penn, 2228 North Fifth Street.

February 23d, 1877.

JOHN AUER, Esq. Dear Sir: If I do not hear from you to-day, I shall put a bill on the property 1836 Germantown Avenue to-morrow, still holding you, as before stated, for rent until the expiration of the lease. Yours, respectfully,

J. McGEOGH, Agent for Joseph Penn.

PHILADELPHIA, March 1st, 1877.

JOHN AUER, Esq. Dear Sir: A party named Frederick Metzger is desirous of renting 1836 Germantown Avenue; he is willing to pay thirty dollars per month. If you have any objection, please let me know. If I do not hear from you by to-morrow morning, I will rent it to him, and still hold you as security.

Yours, respectfully,
JAS. McGEOGH, Agent for Joseph Penn.

PHILADELPHIA, September 15th, 1877.

JOHN AUER, Esq. Dear Sir: Frederick Metzger, present occupant of 1836 Germantown Avenue, is removing. John Riehl, a former occupant of the place, desires to rent it. Unless I hear from you to the contrary, I shall rent it to him, still holding you, of course, for the rent as security on the lease. Yours, respectfully,

JAMES McGEOGH,
Agent for Joseph Penn, 2228 North Fifth Street.

January 2d, 1878.

JOHN AUER, Esq. Dear Sir: Store 1836 Germantown Avenue is again vacant; there is a party named Sylvester Kreider who wishes to rent it as a barber-shop. If you have no objections I will rent it to him, still holding you, of course, as security under the lease.

Yours, respectfully,

J. McGEOGH.

Agent for Joseph Penn, No. 2228 North Fifth Street.

January 21st, 1878.

JOHN AUER, Esq. Dear Sir: Premises 1836 Germantown Avenue being idle, I shall put a bill on the same, to rent, unless I hear from you to the contrary, holding you, of course, as security under the lease.

Yours, respectfully,

J. McGEOGH, 2228 North Fifth Street.

May 13th, 1878.

JOHN AUER, Esq. Dear Sir: There is a party named William Piersons, who desires to rent the house 1836 Germantown Avenue, for a saloon. I cannot get any more than $25. If I do not hear from you by to-morrow morning I shall rent it, holding you, of course, under the lease as security. Yours, respectfully,

J. McGEOGH, 2228 North Fifth Street.

No answers were received to these communications. McGeogh rented the premises to various tenants from time to time, credited the lessee with the rents received from them, leaving a balance due, at the expiration of the term, of $355, for which this suit was brought.

The defendant presented the following points: —

1. "That if the jury find that the premises leased were unhealthy and untenantable by reason of impure air, arising from defective drainage, which existed when the lease was made; that this fact was known to the plaintiff, and he refused to remedy the defect, and that the tenant removed in consequence thereof, the plaintiff cannot recover in this suit. The tenant is not bound to repair defects existing when he leases the premises."

Answer. "I was going to say that that is a proposition of law, which it does not seem to me necessary to answer, in one way or another, here, because there is no testimony to that effect; on the contrary, the testimony on both sides has been that the house was perfectly satisfactory at the time it was leased, that Mr. Brown lived in it about a year afterwards. I do not think the state of facts arises here which makes it necessary for me to answer the point."

2. "If the landlord took possession of the premises, and used or occupied the same, either personally or by a second tenant, he will be estopped from collecting the rent for the same period of the former tenant, unless otherwise agreed between them."

Answer. "The phraseology there is a little ambiguous. 'If the landlord took possession of the premises.' If that means that if the landlord accepted the surrender of the premises and agreed to release the tenant, the proposition is true; but the mere fact, as I have said to you, of the landlord's taking possession of the premises and renting them, after the other party had refused to remain upon them, does not produce the effect that is here asked for. If that is the meaning of the point, I refuse to affirm it."

The learned judge charged the jury, *inter alia*, as follows: "The rule of law is perfectly well settled in this State, that a landlord is not liable for repairs unless there is a special stipulation to that effect in the lease. Any man has a right to take the premises of any other man if he pleases, making any covenant or agreement with the landlord that he pleases, but it is settled that he cannot withhold the payment of the rent on account of the bad condition of the premises.

"The second point that he makes is, that he surrendered possession of these premises. A contract to lease a house, or a contract to take a house, is like any other agreement. After you have made it, one party has no right to put an end to it. No man, after you have made an agreement or contract with him, can come to you and say, 'I will give up this contract.' Unless both parties assent to the giving up of the contract, the contract cannot be broken in that way. Undoubtedly, if the landlord and tenant come together, and a landlord agrees to accept a surrender of the premises, that would end the lease and responsibility of the tenant; but a tenant has no right to go into a landlord's office and say, 'I have done with the house,' and throw the key on the floor of the landlord's office. The landlord is not bound to let the key remain on the floor; he has a perfect right to hang it upon a nail without it being evidence that he accepts the surrender. . . . On the contrary, he says, 'I will hold your surety responsible.' It does not constitute a surrender or an acceptance by the landlord that he takes possession of the property and looks after it, and rents it, because that is for the benefit of both parties.

"[If a man refuse to continue your tenant, gives up the house into your hands, why then you have a right to put a bill upon the house, and try to rent it, because if you rent it, it is so much saved to Mr. Auer, so much saved to the surety, or the tenant, because you have to give an account of every cent you make out of the house, and certainly it is much better for the tenant that the landlord should rent the house and get something for it than to simply lock the door, and lay by and sue the tenant or the surety for the whole amount of the rent for the whole term for which he has taken it, so that, being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender that he has taken and leased the house.]

"[In regard to the leasing in the name of Mr. Penn, I see no pertinence in that, one way or the other. I do not see what right he would have to use Mr. Auer's name as landlord any more than he had to use

the name of any one of us, and rent any property for us. He did the best — he was bound to do the best he could for the property — it was quite immaterial under whose name he rented it.]"

Verdict and judgment for the plaintiff, for the amount claimed. The defendant took this writ of error, assigning for error the answers of the court to his points, and the portion of the charge above quoted in brackets.

M. Arnold (*Wm. W. Kerr* with him), for the plaintiff in error.

Wm. Gorman, for the defendant in error.

Mr. Justice Paxson delivered the opinion of the court, February 13th, 1882.

Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term, and sending the key to his landlord. The reason for it is that in the absence of fraud, one party to a contract cannot rescind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice Rogers in *Marseilles* v. *Kerr*, 6 Wharton, 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. A surrender, a release, or an eviction will undoubtedly relieve a tenant, and it was said by Chief Justice Gibson, in *Fisher* v. *Milliken*, 8 Barr, 111, that nothing less would do so. This remark, however, was without the authority of the court, and must be regarded as *dictum*. The case in hand does not require us to assert so broad a proposition. There was neither a release nor an eviction here, but the surety claimed to be discharged because after the tenant, who was his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretence that the landlord accepted a surrender; on the contrary, the proof is clear that he declined to do so, and notified the defendant below that he would hold him for the rent. This notice was repeated on more than one occasion when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from his covenant, and must prove it. When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if

any. It was said in *Brueckmann* v. *Twibill*, 8 Norris, 58, that "taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent." Much more is it to the interest of the tenant for the landlord to rent the premises. If at the same rent, the tenant is entirely relieved; if at less, he is liable only for the difference.

Upon the trial in the court below, the learned judge instructed the jury, as set forth in the second assignment of error, as follows: "If a man refuses to continue your tenant, gives up the house into your hands, why, then, you have a right to put a bill upon the house and try to rent it: because, if you rent it, it is so much saved to Mr. Auer, so much saved to the surety of the tenant, because you have to give an account of every cent you make out of the house; and certainly it is much better for the tenant, that the landlord should rent the house and get something for it, than to simply lock the door and lay by and sue the tenant or surety for the whole amount of the rent for the whole term for which he has taken it; so that, being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender, that he has taken and leased the house."

We see no error in this. It is good sense as well as good law.

We are not aware of any authorities in this State which are in conflict with the foregoing views. Those cited on behalf of the defendant below certainly are not.

The remaining assignments do not require discussion. The fifth does not fully state the ruling of the court below. As it appears in the bill of exceptions it is entirely correct.

Judgment affirmed.

NOTE. — "If, owing to some rule of law, a deed fail to take effect in the manner intended, it will, if possible, be construed so as to take effect in some other manner which will carry the expressed general intention of the parties into effect." Elphinstone, Deeds, 40. A case illustrating this important rule is *Eve* v. *Townsend*, 2 Wils. 75; 1 Gow, Cas. on Prop. 494. See also the cases collected, Elphinstone, *loc. cit.*

EXCHANGE. LIT. § 62. And in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin, and such exchange made by parol of tenements within the same county without writing is good enough.

LIT. § 63. And if the lands or tenements be in divers counties, viz., that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made between them of this exchange.

LIT. § 64. And note, that in exchanges it behooveth, that the estates which both parties have in the lands so exchanged, be equal; for if the one willeth and grant that

the other shall have his land in fee tail for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is void, because the estates be not equal.

Lit. § 65. In the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general, and the other in the other land fee tail especial, &c. So always it behooveth that in exchange the estates of both parties be equal, viz., if the one hath a fee simple in the one land, that the other shall have like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land, &c., and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a far greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equal. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c., and in each of their grants mention shall be made of the exchange.

Co. Lit. 51 b. To shut up this point, there be five things necessary to the perfection of an exchange. 1. That the estates given be equal. 2. That this word (*excambium*, exchange) be used, which is so individually requisite, as it cannot be supplied by any other word, or described by any circumlocution: and herewith agreeth Littleton afterwards in this section. In the book of Domesday I find, "Hanc terram cambiavit Hugo Briccuino quod modo tenet comes Meriton, et ipsum scambium valet duplum."

"Hugo de Belcamp pro escambio de Warres."

3. That there be an execution by entry or claim in the life of the parties, as hath been said. 4. That if it be of things that lie in grant, it must be by deed. 5. If the lands be in several counties, there ought to be a deed indented, or if the thing lie in grant, albeit they be in one county.

Perk. § 265. If an exchange be made between me and T. K., viz., that after the feast of Christmas, he shall have my manor of Dale, in exchange for his manor of Sale, &c., it is a good exchange; and each of us may enter into the other's manor, after Christmas, &c.

The Statute of Frauds, Statute 29 Car. II. *c.* 3 (1676), made void all estates not created by writing; and the Statute 8 & 9 Vict. *c.* 106, § 3 (1845), required exchanges to be by deed.

For a long time past exchanges have been little, if at all, used.

Partition. This will be dealt with in a later volume, in connection with joint interests.

Form of Conveyance. Lit. § 370. And for that such conditions are most commonly put and specified in deeds indented, somewhat shall be here said (to thee, my son) of an indenture and of a deed poll concerning conditions. And it is to be understood, that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together be.

Co. Lit. 229 a. "In deeds indented." Those are called by several names, as *scriptum indentatum*, *carta indentata*, *scriptura indentata*, *indentura*, *litera indentata*. An indenture is a writing containing a conveyance, bargain, contract, covenants, or agreements between two or more, and is indented in the top or side answerable to another that likewise comprehendeth the selfsame matter, and is called an indenture, for that it is so indented, and is called in Greek *σύγγραφον*.

If a deed beginneth, *hæc indentura*, &c., and in troth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting.

"In deeds indented." And here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a stone, or the like, &c., and the same be sealed or delivered, yet it is no deed, for a deed must be written either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption.

"If the indenture be bipartite, or tripartite, or quadripartite, &c." "Bipartite" is, when there is two parts and two parties to the deed. "Tripartite," when there are three parts and three parties; and so of "quadripartite," "quinquepartite," &c.

"And of a deed poll." A deed poll is that which is plain without any indenting, so called because it is cut even, or polled. Every deed that is pleaded shall be intended to be a deed poll, unless it be alleged to be indented.

"All the parts of the indenture are but one deed in law." If a man by deed indented make a gift in tail, and the donee dieth without issue, that part of the indenture which belonged to the donee doth now belong to the donor, for both parts do make but one deed in law.

"And every part of the indenture is of as great force, &c." This is manifest of itself, and is proved by the books aforesaid.

It is to be observed, that if the feoffor, donor, or lessor seal the part of the indenture belonging to the feoffee, &c., the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffor, &c. See also Butler's note (138) *ad loc.*

On the reason why deeds were required to be on paper or parchment, see Pollock, Contr. (2d ed.) 129.

In *Burchell* v. *Clark*, 1 C. P. D. 602; s. c. 2 C. P. D. 88 (1876), the *habendum* of a lease stated the term as ninety-four and one quarter years, the *reddendum* stated it as ninety-one and one quarter years, and in the counterpart the *habendum* and *reddendum* both stated the term as ninety-one and one quarter years. The Common Pleas Division (*Brett* and *Archibald*, JJ.) *held*, that the statement of the *habendum* must prevail. But the Court of Appeal (*Cockburn*, C. J., and *Bramwell* and *Amphlett*, JJ.; *Kelly*, C. B., dissenting) reversed the judgment of the Common Pleas Division.

Recital of Consideration. The existence of the consideration recited in a deed cannot be denied between the parties for the purpose of avoiding the deed. *Wilcox* v. *Lemon*, Dyer, 169 a; *Trafton* v. *Hawes*, 102 Mass. 533, 541 (although in the United States, in an action to recover the price of land, a recital in the deed that the purchase-money has been paid, is not conclusive. See 1 Greenl. Ev. § 26). Considerations not stated in a deed, if inconsistent with those which are stated, may be averred and proved. *Mildmay's Case*, 1 Co. 175; 1 Gray, Cas. on Prop. 498. *Gale* v. *Williamson*, 8 M. & W. 405. *Clifford* v. *Turrell*, 9 Jur. 633.

CHAPTER IV.

DESCRIPTION OF PROPERTY GRANTED.

SECTION I.

LAND NOT APPURTENANT TO LAND.

ARCHER *v.* BENNETT.

King's Bench. 1664.

[*Reported* 1 *Lev.* 131.]

Ejectment, and upon Not guilty, a special verdict: A man seised of a close, on one part whereof was a house, and on another part thereof was a kiln; and also of two mills adjoining to the close; and used and occupied them all together till 1655, when he divided them, and sold the house and a part of the close, and reserved the other part and the kiln, and used them with the mills (and in truth the kiln was a kiln for the drying of oats, and the mills were for the making of oat-meal, but this was not found by the verdict). And afterwards he sold the mills *cum pertinentiis* to the plaintiff: and whether the kiln, and the parts of the close on which they stood, should pass to the plaintiff, was the question. And it was held clearly by the court, that they did not pass; for by the grant of a messuage or lands *cum pertinentiis*, any other land or thing cannot pass, though by the words *cum terris pertinentibus* it would: and gave judgment for the defendant. But by Wyndham, Justice, if all the matter had been found, and that the kiln was necessary for the use of the mills, and without which they were not useful, the kiln had passed as part of the mills, though not as appurtenances. As by the grant of a messuage, the conduits and water-pipes shall pass as parcel, though they are remote; to which no answer was given.[1]

[1] In *Hill* v. *Grange*, 1 Plowd. 164 (1557), the question was what passed by a demise of a messuage, with all the lands to the same messuage appertaining. The judges "all argued to the same intent, and agreed unanimously that land could not be appurtenant to a messuage in the true sense of the word *appertaining*. For a messuage consists of two things, viz., the land and the edifice; and before it was built upon it was but land, and then land cannot be appurtenant to land. For a thing of one substance cannot be appurtenant to a thing of the same substance, and when it is built upon then it is a messuage, and consists in a great measure of the same substance that it did before. But the name is changed entirely, so that if the building afterwards falls to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a *toft*, which is a name superior to

LEONARD *v.* WHITE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1810.

[*Reported* 7 *Mass.* 6.]

TRESPASS for breaking and entering the plaintiff's close, situate in West Springfield, and beating and driving away the team of the plaintiff, viz., one horse and one yoke of oxen, &c.

The declaration contained several counts, and the defendant pleaded a number of pleas in bar. That on which the question, which came before the court arose, alleges in substance, that the defendant and his wife were seised in their right of the *locus in quo*, and because the horse and oxen of the plaintiff were there doing damage, the defendant rightfully removed them. The replication traverses the seisin alleged in the plea, and tenders an issue, which is joined by the defendant.

From the report of *Sedgwick*, J., who sat in the trial of this issue, it appears that one Asaph Leonard, before and until the 4th day of April, 1789, was seised in fee of an *ancient* grist-mill, which stood at the distance of several rods from the highway, and of the land between

land, and interior to messuage; and this name it shall have in respect of the dignity which it once bore. But the chief substance of a messuage is the soil, although the superstructure and the soil are one entire thing: and then nothing can be appurtenant to another but where it is of another nature and substance. And therefore it was said, there is *hereditas corporata* and *hereditas incorporata*. *Hereditas corporata* is such as messuage, land, meadow, pasture, rents, and the like, which have substance in them, and may continue always. But *hereditas incorporata* is such as advowsons, villains, ways, commons, courts, piscaries, and the like, which are or may be appendant or appurtenant to inheritances corporate; and such things are and may be termed appurtenances. And Bracton calls the things which are inheritances corporate things corporeal; and after he has treated of corporeal things, he has a chapter concerning appurtenances, wherein he treats of such things corporeal, *ut supra*, which are belonging, appendant, or appurtenant to things incorporeal. But a gross name may contain divers things corporeal, as a manor, monastery, rectory, castle, honor, and the like, are things compound, and may contain altogether messuages, lands, meadows, wood, and such like, and a thing corporeal may be parcel of a gross name, and of a thing compound, but one simple thing corporeal cannot be a parcel of or appurtenant to another simple thing corporeal. As land cannot be parcel of or appurtenant to meadow, nor meadow parcel of or appurtenant to pasture, nor pasture parcel of or appurtenant to wood, nor can land be parcel of or appurtenant to a messuage, nor to any other thing corporeal, for these things are but simple things, which of themselves cannot receive or include other things corporeal. But an advowson, way, estovers, and such like things incorporeal may well enough be appurtenant to a messuage, and so is the difference. And although it is here pleaded that the land has been appurtenant to the messuage from time immemorial, that pleading or averment is to no purpose or effect. For a man cannot aver that to be appurtenant which the law will not suffer to be appurtenant, though usage and continuance may make a law in such things as stand with and are consonant to reason. But in things which are against law and reason, there usage and continuance is to no purpose, as here the pleading or averment that the land has been always appurtenant to the messuage, is an averment that that is law

the mill and the highway, over which land there is a way, which has been *immemorially* used for the purpose of access to the mill from the highway, and, as was understood, for no other purpose; and this way was the *locus in quo*. On the day above mentioned, the said Asaph conveyed, by deed in fee tail, to the defendant and his wife certain land, comprehending that on which the grist-mill stands, except two third parts of the mill privilege, which he reserved to himself; and this conveyance was made in that manner, "*with the appurtenances thereon.*" After the decease of the said Asaph, the devisees of his real estate conveyed to the defendant all their interest and estate in the said grist-mill; "*with all the privileges and appurtenances thereunto belonging.*"

Upon this evidence the jury were directed to find their verdict, upon this issue, in favor of the plaintiff, which they accordingly did, the defendant moving for a new trial, as for a misdirection of the judge.

Bliss, for the defendant.

Hooker and *Lathrop*, for the plaintiff.

The opinion of the court was afterwards delivered by

SEDGWICK, J. (after stating the substance of the report). It is not contended in this case, on the part of the plaintiff, that the conveyance,

which is not law. And all the four justices agreed unanimously that the averment or pleading that the land has been always appurtenant to the messuage is not good here, and also they agreed that land might not be appurtenant to a messuage in the true and proper definition of an appurtenance. But yet all of them (except BROWN, Justice, who did not speak to this point) agreed that the word (*appertaining* to the messuage) shall be here taken in the sense of *usually occupied* with the messuage, or *lying* to the messuage, for when *appertaining* is placed with the said other words, it cannot have its proper signification, as it is said before, and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with*, or *lying to*, *ut supra*, and being placed with the said other words it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense, it is the office of judges to take and expound the words, which common people use to express their meaning, according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it. As where a lease was made for life, and after his death that the lands *redibunt* to a stranger, it was taken as *remanebunt*, for to that purpose the party there used it, and therefore, by 18 Ed. 3, it shall be taken by way of a remainder. And so a lease for life, the *reversion* to a stranger, shall be taken for a *remainder*, *causa qua supra*. And many other cases were put where a word shall be taken out of its natural sense, according to the sense intended by the party. So the word (*appertaining*) shall be here taken as *occupied*, *used*, *or lying* with, or to the messuage, and in such sense the averment may serve to declare that the land has been always occupied with, or has lain to the messuage, and the demise shall serve to convey the same to the defendant, and so the bar is good, notwithstanding the said exception. And that was the opinion of the said three justices. And afterwards it was adjudged accordingly, as appears hereafter by the judgment. And in this argument BROWN and SAUNDERS, Justices, held, that a garden and curtilage are parcel of a messuage: and SAUNDERS said that a dove-house, a mill, and shops may be parcel of a messuage, and shall pass by the name of a messuage" (pp. 170, 171).

mentioned in the report, does not operate as the grant of an easement for the accommodation of the mill, by means of the way which has been mentioned; but it is contended that it cannot be considered as a grant of the *soil* over which the way passed; and, on the other side, it is insisted that the deed ought to be considered as a grant of the *land*.

It is agreed that the *locus in quo* is not within the lines designating the limits of the grant. And as the seisin of the defendant and his wife *in the land* is put in issue, the question is, whether the *soil* was conveyed by the expression, "with the appurtenances thereon."

An appendant or appurtenant is a thing used with, and related to, or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant. Co. Lit. 121 b, 122 a. The way, then, as an easement, might be appendant or appurtenant to the mill; but the soil, over which the way went, could not.

An appendant is that which, beyond memory, has belonged to another thing more worthy, and which agrees with that to which it is related, in its nature and quality; and an appurtenant is that, the commencement of which may be known. Co. Lit. 121 b; Com. Dig. Appendant and Appurtenant, A. Appendances and appurtenances will pass by the words, "with the appurtenances thereunto belonging," or by other tantamount expressions.

By the grant of a messuage, *cum pertinentiis*, a shop, annexed to it for thirty years, does not pass, unless it be found to be a parcel of the messuage. Cro. Car. 17. By the grant of a house or land, *cum pertinentiis*, another house or land does not pass, unless it be found to be a parcel. 1 Lev. 131. By the grant of a mill, *cum pertinentiis*, the close where the mill is, or the kiln *there*, does not pass without some further expression. 1 Sid. 211; 1 Lev. 131. Land cannot be appendant to land. 1 Rol. 230, l. 50. Nor can it be appendant to a meadow or messuage. Plow. Com. 170 b. So a meadow cannot be appurtenant to a pasture, nor a pasture to a wood. Plowd., *ubi supra*.

From these authorities it is evident that the deed in question did not convey the soil, over which the way went, to the defendant and his wife; and, therefore, will not support this issue on his part.

Nor can the defendant better avail himself of the deed of the devisees of Asaph Leonard to him, inasmuch as it is a conveyance to himself alone, whereas his plea sets up a joint seisin in himself and his wife; and, further, this last deed is subject to the same objections as that which has been already considered; there being no pretence that the soil, in the *locus in quo*, was conveyed by this latter deed, except as appurtenant to the subject of the grant.

We are, for the reasons which have been given, all of opinion that the direction, and the finding of the jury, upon this issue were right.

Judgment on the verdict.

SECTION II.

BOUNDARIES.[1]

A. *In general.*

PERNAM *v.* WEAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1809.

[*Reported*, 6 *Mass.* 131.]

IN a writ of *entry sur disseisin*, the demandant declared on his own seisin, and on a disseisin by the tenant. The tenant claimed under a levy of an execution extended upon the demandant's land, issued upon a judgment recovered against him by one Edmund Sawyer.

On the trial, which was had before *Sewall*, J., at the sittings here after the last November Term, upon the general issue, the only question in dispute was, whether the land, which the tenant claimed to hold, was included within the bounds of the land, on which the execution was extended. Upon the evidence, the judge was of opinion with the tenant, and so directed the jury; but they found a verdict for the demandant. The tenant thereupon moved for a new trial, because the verdict was against evidence.

From the report of the judge, it appears that the land on which the execution of Sawyer was extended, was bounded south-westwardly by Drury Lane, thirty-five feet; north-eastwardly by the land of Sanborn and Collins, ninety-nine feet; north-westwardly by other land of the demandant, *about thirty-five* feet, by a line parallel to Drury Lane; and south-westwardly by land of Fletcher, ninety-nine feet; and this parcel is said to contain thirteen rods.

From a plan which had been taken under an order of the court, the line on Drury Lane, extending from the land of Sanborn and Collins to the land of Fletcher, appears to be thirty-five feet three inches and a half; and by the same plan, the line on the demandant's other land appears to be forty-two feet nine and a half inches; and this last extent of line is preserved for twenty-eight feet six inches from the said other land of the demandant towards Drury Lane, where the length of the line is thirty-seven feet three and a half inches.

The demandant insisted that, as there was an over-measure of three and a half inches on one side, he ought to recover on that side a strip of that width the whole length of the parcel extended upon; and as, on the other side, there was an over-measure of five feet six inches, extending twenty-eight feet six inches, in the form of a parallelogram, he

[1] The topic of Boundaries has been selected as that which furnishes most opportunity for the development of general rules.

ought also to recover that parallelogram. But it was agreed that Drury Lane, the land of Sanborn and Collins on one side, and the land of Fletcher on the other side, are all fixed, known monuments, about which there was no dispute; and that there was no question between the parties as to the other land of the demandant's parallel to Drury Lane. The demandant relied not only on the admeasurement, but also on the contents, which give the tenant thirteen rods and two fifths, instead of thirteen rods, the contents stated in the extent of Sawyer's execution.

There was no argument, and the opinion of the court was delivered to the following effect by

Parsons, C. J. Upon considering the facts in this case, we have no doubt as to the motion. It must prevail, and a new trial be granted. When the facts were agreed by the parties, or proved at the trial, the result was a mere conclusion of law. And on these points the law has been long settled.

When the boundaries of land are fixed, known, and unquestionable monuments, although neither courses, nor distances, nor the computed contents, correspond, the monuments must govern. With respect to courses, from errors in surveying instruments, variation of the needle, and other causes, different surveyors often disagree. The same observations apply to distances, arising from the inaccuracy of measures, or of the party measuring; and computations are often erroneous. But fixed monuments remain: about them there is no dispute or uncertainty; and what may be uncertain must be governed by monuments, about which there is no dispute.

In the present case, Sanborn and Collins's land on one side, and Fletcher's on the other, are fixed monuments. The land is bounded on them, and must extend in width from one to the other. If the contents had proved less than thirteen rods, yet the tenant could claim only to those monuments; and where the contents are found to be greater, he still shall hold to the same monuments. The jury therefore mistook the law; and the cause must be sent to another jury to correct the mistake.

New trial ordered.[1]

[1] "It may be laid down as a universal rule, that course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer this one or the other. Cases may exist in which the one or the other may be preferred upon a reasonable consideration of all the circumstances." *Per* Story, J., in *Preston* v. *Bowmar*, 6 Wheat. 580 (1821); and see *Loring* v. *Norton*, 8 Cranch. 61, 68 (1834).

In *Millett* v. *Reade*, 8 Cush. 159 (1851), "four feet north from the northerly side" of a building was held to mean four feet from the edge of the eaves; but in *Centre St. Church* v. *Marlboro Hotel Co.*, 51 Me. 413 (1864), "eight feet four inches from the south side" of a building was held to mean that distance from the corner board, and not from the outer edge of the eaves.

MAKEPEACE *v.* BANCROFT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[*Reported* 12 *Mass.* 469.]

THIS was an action of *covenant broken*, brought upon a deed made to the plaintiff by the defendant on the 22d day of May, 1809, purporting to convey to him in fee "a certain piece of land in Cambridgeport, measuring on Worcester Street twenty-two feet and a half, and keeping the same width seventy feet back to another way, with all the privileges and appurtenances to the said lot belonging, meaning to convey thereby the same lot which was conveyed to the said grantor by John M'Neil, by his deed dated October 29th, 1807, including one half of the brick wall mentioned in the deed last aforesaid." — The declaration sets forth two covenants contained in said deed, viz., that the grantor was lawfully seised in fee of the premises, and that he had good right to sell and convey the same as aforesaid; and alleges a breach of both these covenants.

The defendant pleads that he was seised and had good right to convey, &c., according to his covenants. — The plaintiff replies, that at the time of executing the said deed, one Benjamin Whitman was seised in fee of the premises, and that he alone had good right to convey, &c., and traverses the seisin and right of the defendant. — The defendant rejoins, maintaining his plea and tendering an issue which is joined.

This issue was tried at the sittings here after November Term, 1813, before *Jackson*, J., from whose report of the trial it appears that the action was brought to recover the value of one half the brick wall mentioned in the declaration, with the land under the same; the grantor's title to the residue of the premises being undisputed.

It was in evidence that Noah Porter, on the 8th of January, 1806, was seised of the lot in question, and of another adjoining lot of equal dimensions, and on that day conveyed the lot in question to Abijah Ruggles, and the other to Oliver Willet. On the 4th of March, 1806, Willet conveyed his lot to Martin Sikes. On the 18th of July, 1806, Ruggles and Sikes agreed to exchange their lots, and at the same time Sikes agreed to sell the lot, which he was to take on that exchange, to John M'Neil. Accordingly Sikes on that day conveyed the lot which he then held, to Ruggles, and Ruggles on the same day conveyed his lot to M'Neil. Porter, at the time of the conveyances above mentioned, was the owner of a third lot, adjoining that sold by him to Willet, on which was a brick house; and in his deed to Willet he included in the premises granted the one half of the wall of that house adjoining Willet's lot.

In July, 1806, there was no building on either of the other two lots; but Ruggles then intended to build a brick house on the lot which he

received in exchange, and in his said deed to M'Neil, after describing the lot so conveyed to him by Porter, he added, "I do also convey to the said M'Neil the one half of a brick wall that I hereby engage to erect on the adjoining lot now owned by Mr. Sikes, which the said Sikes is this day to convey to me."

There was no money paid between Ruggles and Sikes, nor any other consideration for their two deeds, but the exchange aforesaid: Sikes conveying to Ruggles one half the brick wall already built by Porter, and mentioned in the said deed to Willet; and Ruggles undertaking to convey to the said appointee of Sikes one half the wall which he engaged to build as aforesaid. Both these deeds are subscribed by the same witnesses, acknowledged before the same magistrate, and registered on the day of their date; and the said Ruggles testified that they were both executed at the same time. In October, 1806, Ruggles built a brick house on his lot, and, as he testified, he intended to place one half of the wall adjoining to M'Neil's lot on the land of M'Neil. There was at the time a stake at the street on the line between these two lots, and he endeavored or intended to place the centre of said wall at that stake; but it appeared by actual admeasurement, lately made by another witness, that the whole of this wall was within the boundaries of Ruggles' lot, as described in said deed. On the 29th of October, 1807, M'Neil conveyed the lot in question to the defendant Bancroft, describing it as before, referring to Ruggles' deed to him, and adding these words, "including the one half of the brick wall mentioned in said deed." On the 22d of May, 1809, the defendant conveyed the same lot to the plaintiff by the deed declared on, describing it as in the declaration.

On the 17th of April, 1807, the said Ruggles conveyed the lot, on which he had built said house, to Phinehas Brown, describing it as "a certain tract or parcel of land lying in Cambridge, with a brick dwelling house thereon, bounded and measuring as follows," and then bounds it on one side by land formerly owned by himself, and which he had conveyed to M'Neil, and states the same courses and length of line as in the former deeds, and such as would include the whole of the wall in question in the premises granted. On the next day Brown conveyed the same lot, by a like description, to M. R. Bartlet. On the 29th of the same April, Bartlet conveyed the same lot, by a like description, to Benjamin Whitman; and on the 5th of August the said Whitman conveyed the same, by a like description, to the plaintiff Makepeace.

The defendant insisted first, that on this evidence it appeared he was seised of the piece of land in question, and had a good and indefeasible title thereto, at the time of his conveyance thereof to the plaintiff: but if not so, then secondly, that he was lawfully seised thereof in fact at that time, and had a good right to convey, and did convey the same by his said deed to the plaintiff; in which case the plaintiff could not recover in this action, but if evicted, must bring his action on the covenant of warranty.

The judge, intending to reserve these questions for the consideration of the whole court, directed the jury to find a verdict for the plaintiff, which was accordingly rendered subject to the opinion of the court on the two points above stated. And if the court should be of opinion with the defendant on either of these questions, the verdict was to be set aside, and a verdict entered for the defendant.

An argument was had at the last November Term by *Peabody* for the plaintiff, and *Bigelow* for the defendant; and at this term the opinion of the court was delivered by

PARKER, C. J. [After stating the pleadings, and the facts from the judge's report of the trial.] The titles to both the lots being now united in the same person, no difficulty can arise about the wall hereafter, unless the plaintiff should himself choose to make one. His action is, however, probably founded upon the supposition that, in his purchase of the defendant, he has paid for a wall, which he could not enjoy without extinguishing the title of Brown and those claiming under him; and that he ought to recover back that portion of the purchase money which was given in payment for that portion of the premises. And this would be just, if it should appear that the defendant conveyed to him what he had no title to, or rather, as relates to the covenants declared on, what he was not seised of, and what he had no right to sell; although he had in such case been himself deceived, and would be driven to his action against M'Neil, and M'Neil against Ruggles, who committed the first error, even he supposing and believing that the several conveyances derived from him gave the grantees the property in the wall, which it was his intention to convey.

But we apprehend that this troublesome and expensive series of actions may all be avoided, and the plaintiff left in the full enjoyment of his rights, by an application of the principles of law to the conveyances and acts of the parties in this transaction.

It is manifest by the deed of Ruggles to M'Neil, that although he sold the lot by admeasurement, yet that he intended that a permanent monument should be erected, which was to be a brick wall he was about to build, up to which the lot conveyed was to extend. Afterwards the intended monument was erected, but by accident a little removed from the line of admeasurement. As this wall was an essential part of the consideration in the exchange made with Sikes, and as he bought with a design to comply with his own contract with Sikes, it is very clear that had M'Niel immediately built upon the lot conveyed to him by Ruggles adjoining to this brick wall, Ruggles could have taken no exception to it, nor could he have maintained a writ of entry or an action of trespass against him; for his deed would have estopped him to claim anything beyond the wall so built. M'Neil, indeed, must be considered as having become lawfully seised, under his deed from Ruggles, of the lot limited on one side by the centre of the wall of Ruggles's house: because it was the intention of Ruggles so to grant to him; and the monument referred to in the deed, although set up after

the delivery, will conclude the grantor, even though it should not comport with the lines specified in the deed. Thus if a deed of land should pass at a distance from the premises granted, and reference should be made to a stake and stones for the termination of one of the lines, no such monument actually existing; and the parties should afterwards fairly erect such a monument, with intent to conform to the deed, we think the monument so placed would govern the extent, although not entirely coinciding with the line described in the deed.

We are therefore of opinion that M'Neil was lawfully seised of the lot, so as to include one half of the wall, which Ruggles built for his use, and being so seised had a right to convey the same; and of course the defendant became seised in like manner by the conveyance of M'Neil, and continued so seised until he parted with his title to the plaintiff. Whether this seisin was an indefeasible one or not, is immaterial in the present action. But we are inclined to think that it could not be defeated by Ruggles, or by any person claiming under him. For by a conveyance of his other lot, on which the house was built by him, no right could pass against M'Neil or the defendant, to anything of which he was dissesised at the time: and he might be estopped by his deed to claim for himself.

In this view of the subject, the plaintiff fails to support his action: because no breach of the covenant declared on is proved. The defendant was seised when he made his deed, and therefore had a right to sell. If an eviction should afterwards take place, the plaintiff would have his remedy upon his covenant of warranty. At present he is undisturbed: and he is likely to remain so; for he has purchased up the only title which could disturb him: and there is upon the whole no probability that he paid anything to extinguish the doubtful claim, which he supposes now to exist in Brown, who was the immediate grantee of Ruggles, of the lot which is thought to be encroached upon by the successive owners of the other lot.

The verdict returned for the plaintiff must be set aside, and a general verdict entered for the defendant, and judgment accordingly.[1]

LERNED *v.* MORRILL.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1820.

(*Reported* 2 *N. H.* 197.)

THIS was a writ of entry, in which the demandant counted upon his own seisin within twenty years and upon a disseisin by the tenant.

The cause was tried here at April Term, 1819, upon the general issue, when a verdict was taken for the demandant, subject to the opinion of the court, upon the following facts.

[1] *See Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Greenl. 219.

The tenant, by deed dated March 8, 1806, conveyed to the demandant a tract of land described in the deed as follows: "being the westerly part of lot No. 2, and containing 80 acres, beginning at the north-west corner on Boscawen line; then south by Lerned's land to Contoocook river to a poplar tree, thence by said river to a stake and stones, thence northwardly a parallel line with the side line of said lot to a stake and stones on Boscawen line, thence on said Boscawen line to the bound first mentioned." The stakes and stones mentioned in the deed were not erected at the time of making the deed; but about eighteen months afterwards, the parties went upon the premises with a surveyor and chain-men to run out and locate the land, and they erected the stakes and stones at the north-east and south-east corners of the premises. The parties first measured the whole lot, divided it in the middle, and then measured off ten acres from the east half and adjoining the west half, and set up stakes and stones at the north-east and south-east corners of the land so measured off, and ran the line from one stake and stones to the other, and set up stakes and stones at every tally. The tenant immediately cleared his land up to the line and built a fence upon it. The demandant also built a board fence on the line, and the parties occupied and improved the land on each side of that line till 1817. It was proved that the tenant said the demandant bought ten acres more than half the lot. In the fall of 1817, the defendant surveyed the lot, and finding that the demandant had more than eighty acres, removed the fence, and went into possession of all but eighty acres, and this action is brought to recover the land, of which the tenant thus took possession.

J. Harris, for the demandant.

Per Curiam. The question presented to us in this case for decision, has long been settled, and must now be considered as entirely at rest. Where land has been conveyed by deed, and the description of the land in the deed has reference to monuments, not actually in existence at the time, but to be erected by the parties at a subsequent period: when the parties have once been upon the land and deliberately erected the monuments, they will be as much bound by them, as if they had been erected before the deed was made. In this case, there was a reference in the deed to monuments not actually existing at the time, but the parties soon after went upon the land with a surveyor, ran it out, erected monuments, and built their fences accordingly; and this is not all. They respectively occupied the land according to the line thus established, for nearly ten years. And there is now no evidence in this case of any mistake or misapprehension in establishing the line. There is no pretence that the tenant could lawfully remove monuments thus deliberately erected and so long acquiesced in. His claim to the demanded premises, for ought that appears in this case, is without any foundation whatever, and there must be

Judgment for the demandant.

BOWMAN *v.* FARMER.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1836.

[*Reported* 8 *N. H.* 462.]

THIS was a writ of entry, brought to recover a tract of land in Goffstown, and was tried upon the general issue at September Term, 1836.

It appeared that the parties were the owners of two adjoining lots; each of which was bounded east by Merrimack River; and the lot of the demandant lay southerly of the lot owned by the tenant.

It further appeared, that the tenant, being the owner of both lots, on the 8th October, 1823, by deed conveyed the southerly lot to Thomas Pollard, under whom the demandant claims that lot. The dividing line between those lots is thus described in that deed: "Beginning at the mouth of Black Brook, on the south side of the brook, and running from thence up said brook due west until it strikes the line of the common land."

The deed contained a reservation, in the following words: "Reserving one half the privilege of using and occupying said Black Brook, for the purpose of rafting or otherwise, which privilege is to be owned and occupied in common betwixt the parties respectively."

Black Brook is a stream running easterly into Merrimack River, in a very winding course, sometimes on the one side of a line drawn due west from the mouth of the brook, and sometimes on the other side, and runs a few rods south of the place where that line strikes the common land.

The land demanded in the writ in this case is a tract bounded northerly by the brook and southerly by the said line; and the question was, whether the brook or a line drawn due west from the south side of the mouth of the brook was the true dividing line between the lots.

A verdict was taken for the demandant, by consent, subject to the opinion of the court upon the foregoing case.

C. H. Atherton, for the demandant.

Steele and *Farley*, for the tenant.

RICHARDSON, C. J., delivered the opinion of the court.

It is a well settled general rule, that in a description of land in a deed of conveyance, what is most material and certain shall control that which is less material and uncertain. Thus a river, a known stream, a spring, or a marked tree, when declared to be a boundary in a deed, will control both course and distance. 9 Cranch, 178; 7 Cowen, 723, *Jackson* v. *Wedger*; 1 do. 605, *Jackson* v. *Camp*; 7 Wheaton, 10, *Newton* v. *Prior*; 6 do. 582, *Preston* v. *Bowmun*.

And if in the deed of the tenant in this case a reference had been made to Black Brook, as a boundary between the two tracts, it is very clear that the brook must have prevailed against the point of compass stated in the deed.

But the terms, "running from thence up said brook," do not necessarily imply that the line is to run *on* or *by* the brook. They may just as well mean that it is to run in a course corresponding with the general course or direction of the brook between the common land and the river, which is very nearly east and west. And if the intention had been to make the brook the boundary, it would naturally have been stated that the line was to run *on* or *by* the brook.

We are, therefore, of opinion that the brook is not designated in the deed as a boundary with sufficient certainty to control the point of compass, which is expressly stated to be due west.

The verdict is, therefore, set aside, and

A new trial granted.

BLANEY *v.* RICE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[*Reported* 20 *Pick.* 62.]

WRIT of entry. The demandant owned a house and land fronting westerly on Charles Street, in Boston, and running back easterly towards George Street, and the tenant owned a house and land fronting easterly on George Street and running back westerly towards Charles Street.

Prior to January 23, 1807, the parcels belonging to both parties, together with other adjoining land, were owned by Charles Bulfinch.

On January 23, 1807, Bulfinch conveyed to Silas Whitney, junior, a parcel of land bounded westerly on the great street, (Charles Street,) sixty feet, southerly on land of Whitney eighty-five feet, more or less, easterly on Bulfinch's own land sixty feet, and northerly on Bulfinch's own land eighty-five feet, more or less. On March 6, 1807, the northerly half of this lot was conveyed by Whitney to the demandant.

On November 12, 1810, Bulfinch conveyed to Benjamin Joy and others, four lots bounded on George Street, running back from George Street eighty feet and bounded westerly partly on a passage way and partly on land of Whitney and the demandant. These lots were subsequently divided and one of them came, through several mesne conveyances, to the tenant, by a deed dated May 24, 1832.

The deed to Joy and others referred to a plan which Bulfinch, subsequently to his deed to Whitney, had prepared and signed and placed on record in the registry of deeds, on which the lots above mentioned were laid down, giving to the lot previously sold to Whitney about eighty-eight feet in depth and including the demanded premises, and designating the lots on George Street, then owned by Bulfinch himself, as eighty feet deep.

On measuring back from Charles Street towards George Street eighty-five feet, for the demandant's lot, and back from George Street towards

Charles Street eighty feet for the tenant's lot, there is a strip between them, which is the land in controversy.

The question of title depended entirely upon the construction of the deeds as applied to the lots of the parties and the adjoining land, without any aid from evidence of possession or occupancy.

Bartlett and *F. C. Loring*, for the demandant.

H. H. Fuller and *Washburn*, for the tenant.

SHAW, C. J., delivered the opinion of the court. In construing the deed from Bulfinch to Whitney, bounding the estate on Charles Street, and running back eighty five feet more or less, these words, "more or less," may be considered as having some meaning, so as not to fix the distance absolutely, though these words are often introduced without having practically any effect. The words of description, "eighty-five feet more or less," if there were nothing in other parts of the deed, or the subject to which it applies, to control or explain them, especially where the grant is of a parcel measured out of the grantor's own larger tract, would be equivalent to eighty-five feet absolutely. But the words "more or less" may be considered equivalent to a suggestion, that either there is some monument, abuttal or line there, or as an intimation that one is intended to be placed there, to stand as the line intended, in place of the absolute admeasurement. The fact that Bulfinch the grantor, soon after the execution of this deed, made a plan of this and the adjoining lots, and placed it on record for the information of all concerned, making these two lines described as eighty-five feet more or less, about eighty-eight or eighty-nine feet, is equivalent to the fixing of such line or monument, so far as his own rights and those claiming under him were concerned. It may be presumed to have been done by agreement and in pursuance of the contract of sale; but without such presumption, it would be conclusive of the intent of the grantor, in regard to the indefinite words used in his deed, and good against him and those claiming under him. This act being done by Bulfinch, before he conveyed any of the other lots, is sufficient to answer the rule of fixing a monument or abuttal soon after the conveyance.

But there is another view of the case which seems quite decisive. The subsequent deed of Bulfinch to the ancestor of the defendant, and that under which alone he can claim, described the lot as bounded on George Street, and running back eighty feet, and there bounded on the land of Whitney and Blaney. The same deed referred to the plan then on record, and therefore the bound on the land of Whitney and Blaney most naturally and obviously means, the land of Whitney and Blaney as designated and marked upon that plan, especially as such construction gave to the grantees the whole depth of eighty feet as mentioned in the deed.

The court are of opinion, that the demandant has established the better title to the narrow strip of land in question, and is entitled to recover it in this action.

EMERY *v.* FOWLER.

SUPREME JUDICIAL COURT OF MAINE. 1854.

[*Reported* 38 *Me.* 99.]

ON exceptions from Nisi Prius, *Tenney*, J., presiding.

Trespass. Plea, general issue.

Both parties claimed the land where the alleged trespass was committed, and the question was as to the line between them.

The title on both sides was derived from John C. Freeze, who on July 2, 1832, conveyed to Stephen Nye (under whom defendant claims), the following tract: "beginning at the southwest corner of said lot of land this day sold and conveyed to me by said Stephen and Heman Nye; thence across said lot to the Rolfe road (so called), on such a course as that a line extended across said lot to said road, and thence on said road northerly to a point in said road where it is intersected by the head line of said lot; and thence on the head line thereof to the place of beginning, shall contain *exactly one acre and a half*."

Freeze conveyed to T. Boutelle (under whom the plaintiff claims), on the same day, a certain tract of land embracing in its description the land conveyed to Nye and a larger tract, in which was this reservation: "excepting and reserving from the lot hereby sold two small lots of land lying at the head of said lot, containing one acre and a half, as by reference to my deed of said two lots to Stephen Nye of even date will appear, reference thereto being had."

Boutelle conveyed to the plaintiff, April 25, 1835. Nye conveyed by quitclaim to one Benjamin F. Wing, February 14, 1837, and Wing conveyed to the defendant, April 24, 1847.

While the adjoining lands were owned by plaintiff and Wing a controversy arose about the line, and they agreed in writing to submit the determination of it to two referees. Before the time appointed for a hearing, Wing sold the land to the defendant, and it did not appear that he had any knowledge of the agreement of his grantor. The referees notified the parties to the submission, and made an award.

This submission and award were offered in evidence by the plaintiff, but, being objected to by defendant, were excluded by the court.

Evidence was offered by defendant tending to show that on the day the deeds were made by Freeze to Boutelle and Nye, a claim was made on Freeze for some improvements upon the lots by Nye and another; *that* that controversy was referred to two persons to determine it, who awarded that Freeze should convey to Nye one acre and one half from the lot; *that* they located the land upon the earth by the consent of Freeze, Boutelle and Nye; *that* those referees put up stakes upon the line run by them; *that* the deed was written immediately after this location, and delivered; *that* Nye went into possession under the deed

and so continued until he conveyed. There was other evidence in the case.

On this part of it, the jury were instructed, that they would look at all the evidence touching the location and conveyance of this parcel of land, and although the deed described only one acre and one half, still if the grantor therein located the same by adopting and consenting to the line made by the referees, and the deed was made immediately after such location, the boundaries being assented to by the parties to the deed and said Beatelle, who took conveyance of the residue of the Freeze lot, if such was the fact, those boundaries and monuments were controlling, notwithstanding it might be found afterwards that they embraced more or less, than the quantity specified.

The jury returned a verdict for defendant, and the plaintiff excepted to the instruction.

J. S. Abbott, for plaintiff.

Evans and *J. H. Webster*, for defendant.

APPLETON, J. The plaintiff and defendant are owners of adjacent land, deriving title through various mesne conveyances from John C. Freeze. The question in controversy relates to the boundary line between their respective lots.

The plaintiff and Benj. F. Wing, under whom the defendant derives title, on June 9, 1846, entered into bonds to refer the dispute which had arisen in relation to the lines between their lots, to Samuel Taylor and Joseph Burgess, Jr., and bound themselves, their executors and administrators, in the penal sum of one hundred dollars to abide by the decision of the arbitrators thus appointed. On the 24th of April, 1847, Wing conveyed the lot, the boundary line of which is in controversy, to the defendant. There is no evidence that the defendant, when he received his conveyance, had any notice of the agreement to refer, into which his grantor had entered. It is unnecessary to consider what would have been the effect of an award made before his title accrued. It is obvious, that he acquired the land discharged from all contracts, which his grantee had made, of which he had no notice, actual or constructive.

It seems, that on July 17, 1847, the referees, after notifying Wing and Emery, proceeded to adjudicate upon the matters in controversy and made their award. The hearing was *ex parte*, Wing not being present. The defendant had no notice of these proceedings, nor did he assent in any way to the doings of the referees. The award made under these circumstances, was offered by the plaintiff and rejected by the court, and as we think, rightfully rejected. At the time of the hearing Wing had no title to the land, and could not by his acts or omissions to act, affect the rights of his grantee. The award must be regarded as a transaction between other parties and having no binding force whatever upon the defendant.

John C. Freeze originally owned the lot embracing the land of the plaintiff and the defendant. The plaintiff derives his title by deed from

him to Timothy Boutelle, dated July 2, 1832, and the defendant by deed from him to Stephen Nye of the same date. In the deed from Freeze to Boutelle, reference is made to the deed to Nye, and the tract conveyed to the latter is excepted from the operation of the deed to the former. Before these deeds were made, the lots to be conveyed were located upon the face of the earth, fixed monuments established by referees mutually agreed upon, and the parties to these several conveyances assented to and adopted such location.

Deeds were then executed by the parties intended to conform with the location thus made. The respective grantees entered under their deeds, built fences and occupied in conformity with the location of 1832, till 1847, when a dispute arose. It seems that more land is contained within the limits of the defendant's land, as originally located upon the face of the earth, than is specified in the deed. The court in substance instructed the jury, that if they found the facts to be as above stated, "that these boundaries and monuments were controlling, notwithstanding it might be found afterwards that they embraced more or less than the quantity specified."

Whether monuments are erected upon the face of the earth by the mutual agreement of parties, and a deed is given intended to conform thereto, or whether they are subsequently erected by them with intent to conform to a deed already given, those monuments must control, notwithstanding they may embrace more or less land than is mentioned in the deed. The quantity of land is always deemed of secondary importance when compared with fixed and determined boundaries. The instructions given are in accordance with the entire weight of authority, and the exceptions must be overruled. *Waterman* v. *Johnson*, 13 Pick. 261; *Kennebec Purchase* v. *Tiffany*, 1 Greenl. 219.

Exceptions overruled.

SHEPLEY, C. J., and RICE and CUTTING, JJ., concurred.

KNOWLES *v.* TOOTHAKER.

SUPREME JUDICIAL COURT OF MAINE. 1870.

[*Reported* 58 *Me.* 172.]

ON report. Writ of entry. Case is fully stated in the opinion.

S. Belcher, for the plaintiff.

P. M. and *P. H. Stubbs*, for the defendant.

DICKERSON, J. Writ of entry. Both parties claim title through the same grantor, Henry Smith, who, in the first instance, conveyed "parts of lots numbered 9 and 10, on the east side of Sandy River," to the defendant. After reciting the other boundaries, the description in the deed continues as follows, "thence easterly by a line parallel with the north line of lot No. 9 to the county road," the grantee taking the land north of the line now in dispute, and the grantor retaining the land

south of it. The line was run and marked by a surveyor immediately after the conveyance, and the parties then built a fence on it, intending it for a division fence, Smith occupying to the fence on the south, and the defendant on the north side of the fence, for some six years, when Smith conveyed his remaining parcel to the plaintiff's grantor, describing the line in controversy as follows, "to land supposed to be owned by George Toothaker, thence easterly on said Toothaker's south line to the county road." About eight months afterwards, the grantee conveyed the last named premises to the plaintiff, describing it as "the same she purchased of Henry Smith." The plaintiff claims to hold to the line described as running "easterly by a line parallel with the north line of said lot No. 9 to the county road," in Smith's deed to the defendant, which is several rods northerly of the fence, and the defendant claims to hold to the divisional line made by the fence; and the question is, which is the true line between the parties?

The presiding judge ruled that the words, "on said Toothaker's south line," would limit the plaintiff's land to the line established by Toothaker and Smith, on which the division fence was built, and that she could not hold beyond this line, even if she could satisfy the jury that it did not conform to the original lot line; thereupon the parties agreed to submit the question to the law court, judgment to be rendered for the defendant if the ruling is correct; if not, the action is to stand for trial.

But for the acts of the parties in interest, in running, marking, and locating the line, building a fence upon it immediately after the conveyance, and occupying up to it down to the commencement of this suit, the line on the course described in the deed, if it could be ascertained, would be the line between the two parcels. Did these acts fix and establish the divisional line as the true line?

It was early held that where a deed refers to a monument, not actually existing at the time, but which is subsequently placed there by the parties for the purpose of conforming to the deed, the monument so placed will govern the extent of the land, though it does not entirely coincide with the line described in the deed. *Makepeace* v. *Bancroft*, 12 Mass. 469 (1815); *Kennebec Purchase* v. *Tiffany*, 1 Greenl. 211 (1821); *Lemal* v. *Morrill*, 2 N. H. 197 (1820).

Again it was held in *Moody* v. *Nichols*, 16 Maine, 23 (1839), that when parties agree upon a boundary line, and hold possession in accordance with it, so as to give title by disseisin, such boundary will not be disturbed, although found to have been erroneously established. In that case the call in the deed was "a line extended west, so as to include" a certain number of acres, the boundaries upon the other three sides having been accurately described. The parties to the deed agreed upon and marked that line, erected a fence upon it, and held possession according to it for thirty years.

The same doctrine was held by the Supreme Court of the United States, in giving construction to a line described in the deed as "running a due east course" from a given point. *Missouri* v. *Iowa*, 6 How. 660.

So the court in Massachusetts, in giving effect to a deed, describing a line as "running a due west course" from a given point, held that the line located, laid out, assented to, and adopted by the parties, was the true line, though it varied several degrees from "a due west course." *Kellogg* v. *Smith*, 7 Cush. 382 (1851).

In *Emery* v. *Fowler*, 38 Maine, 102 (1854), the call in the deed was a line from a given point, "on such a course . . . as shall contain exactly one and a half acres." The lots to be conveyed were located upon the face of the earth by fixed monuments, erected by referees mutually agreed upon; and the parties to the several conveyances assented to and adopted the location before the deeds were given. Deeds intended to conform to the location thus made were then executed by the parties. The respective grantees entered under the deeds, built fences, and occupied in conformity with the location for fifteen years, when, it being found that more land was contained within the limits of the actual location upon the face of the earth than was embraced within the calls of the deed, a dispute arose. The court held that the monuments thus erected before the deed was given, must control, thus extending the rule adopted in *Moody* v. *Nichols* to cases where the possession had not been long enough to give title by disseisin. That decision also makes the rule of construction the same, whether the location is first marked and established, and the deed is subsequently executed, intended to conform to such location, or whether monuments, not existing at the time, but referred to in the deed, are subsequently erected by the parties with like intention.

In construing a deed, the first inquiry is, What was the intention of the parties? This is to be ascertained primarily from the language of the deed. If this description is so clear, unambiguous, and certain, that it may be readily traced upon the face of the earth from the monuments mentioned, it must govern; but when, from the courses, distances, or quantity of land given in a deed, it is uncertain precisely where a particular line is located upon the face of the earth, the contemporaneous acts of the parties in anticipation of a deed to be made in conformity therewith, or in delineating and establishing a line given in a deed, are admissible to show what land was intended to be embraced in the deed. It is the tendency of recent decisions to give increased weight to such acts, both on the ground that they are the direct index of the intention of the parties in such cases, and, on the score of public policy, to quiet titles. The ordinary variation of the compass, local attraction, imperfection of the instruments used in surveying, or unskilfulness in their use, inequalities of surface, and various other causes, oftentimes render it impracticable to trace the course in a deed with entire accuracy. If to these considerations we add, what is too often apparent, the ignorance or carelessness of the scrivener in expressing the meaning of the parties, we shall find that the acts of the parties in running, marking, and locating a line, building a fence upon it, and occupying up to it, are more likely to disclose their intention as

to where the line was intended to be, when the deed was given, than the course put down on paper, if there is a conflict between the two.

Hence the rule of law now is, that when, in a deed or grant, a line is described as running from a given point, and this line is afterwards run out and located, and marked upon the face of the earth by the parties in interest, and is afterwards recognized and acted on as the true line, the line thus actually marked out and acted on is conclusive, and must be adhered to, though it may be subsequently ascertained that it varies from the course given in the deed or grant.

The acts of the defendant and Smith, through whom the plaintiff claims, in surveying and marking the line in dispute upon the face of the earth by stakes and stones and spotted trees, building a fence thereon, intending it to be the line between them, and occupying up to it, make and establish such line as the divisional line between the two lots.

The ruling of the presiding judge was in accordance with this construction of the deeds, and there must be

Judgment for defendant.[1]

APPLETON, C. J., CUTTING, KENT, BARROWS, and DANFORTH, JJ., concurred.

WHITE *v.* WILLIAMS.

COMMISSION OF APPEALS OF NEW YORK. 1872.

[*Reported* 48 *N. Y.* 344.]

APPEAL from order of the General Term of the Supreme Court, in the First Judicial District, reversing a judgment in favor of the plaintiffs, entered upon the decision of the court, and ordering a new trial.

The action was brought to compel the specific performance of an agreement to sell a lot in the city of New York. The agreement was in writing, dated August 23d, 1863, and described the lot as follows: "The dwelling-house and lot known as No. 26 Rutger's Place, Monroe Street, in the city of New York, being the same premises lately conveyed to the party of the first part, by Muller, the said premises being situated in the corner of Rutger's Place, twenty-six feet and six inches, and being in depth, on Clinton Street, one hundred and twenty feet to and including the stable situated at the rear of said premises."

On the 12th of September, 1863, the defendant executed a deed to carry out the agreement in which the lot was described, as in the written agreement, except it omitted all reference to the stable, thus conveying a lot twenty-six feet and six inches front and rear, and one hundred and twenty feet deep.

It appeared that the parties went to the lot when the agreement was made, and that the defendant pointed out the rear wall of the stable as the rear line of the lot.

[1] Cf. *Kellogg v. Smith*, 7 Cush. 375.

When the contract and the deed were executed, both parties understood that they conveyed the lot to the rear end of the stable, so as to include the stable and the land upon which it stood, and the plaintiffs took possession of the lot and the stable. Some time after they had taken possession, they discovered that the distance of one hundred and twenty feet did not include the whole of the stable, but that the rear line of the lot, as described in the deed, ran through the stable; and that the lot, in order to include the stable, should be one hundred and thirty-one feet and ten inches deep.

It also appeared that the defendant took a conveyance of Peter Muller, June 30, 1863, of two parcels of land; the one described as being a dwelling-house and lot at the northwest corner of Rutger's Place (Monroe Street) and Clinton Street, some twenty-six feet six inches by one hundred and twenty feet, and the other described as adjoining in the rear, being south-west corner of Madison and Clinton Streets, some twenty-six feet six inches by eighty feet. Muller had built the stable upon both lots. It was about twenty-one feet wide, and the rear line of lots passed nearly through its centre.

The court ordered judgment in favor of the plaintiffs, in substance requiring defendants to execute and deliver a new deed, including in the description, by appropriate metes and bounds, the land upon which the stable stands, and judgment was entered accordingly.

Samuel Hand, for appellants.

Francis Byrne, for respondents.

EARL, C. The Supreme Court, at General Term, reversed the judgment given at Special Term, and held that the plaintiffs were not entitled to the relief demanded by them, because both parties were mutually mistaken as to the depth of the lot, both supposing that the one hundred and twenty feet would include the whole of the stable.

The evidence and the finding of the judge show that both parties intended, the grantor to sell and the grantees to purchase, to the rear end of the stable. Both, however, supposed that one hundred and twenty feet would extend the lot thus far. Both parties must stand upon the written agreement, as neither alleges any mistake in it, or claims any reformation of it.

What then is the proper construction of the written agreement according to well-settled rules of law? If the northerly and southerly line is but one hundred and twenty feet, the whole of the stable is not included. If the whole of the stable is included, the line is longer. Which of these descriptions shall prevail?

It is perfectly well settled, that where there is a discrepancy in a description of land between the distance named therein and a fixed known monument, such as a fence, wall, building, or other specified object, the latter must prevail over the former. In *Woodhull* v *The People*, 8 Wend. 183, it is said that, "in the construction of grants, both course and distance must give way to natural or artificial monuments or objects, and courses must be varied and distances lengthened

or shortened, so as to conform to the natural or ascertained objects or bounds called for by the grant." There are numerous other cases to the same effect. These cases all proceed upon the theory that the parties were mistaken as to the courses and distances, and intended to convey by the well-known monuments, in reference to which they were not likely to be mistaken.

It does not help the defendant in this case to claim or show, that both parties were mistaken as to the depth of this lot in feet, so long as it is clear, both by the parol negotiations which preceded the written agreement, and the written agreement itself, that they intended a lot so deep as to include the stable.

There might be cases, in actions for specific performance, where it would not be proper to apply this rule of construction, as if the parties had contracted particularly in reference to distances, and it would be a great hardship for the vendor to convey by the natural or well-known monuments, and clearly inequitable to compel him to do so. But here there is no proof that defendant would be seriously harmed or discommoded if he were compelled to convey the stable, and there is no proof that the consideration paid by the vendees is not an ample price for the whole lot, including the stable.

I, therefore, reach the conclusion that the order of the General Term should be reversed, and the judgment at Special Term affirmed, with costs. *Order reversed.*

All concur. LEONARD, C., not sitting.

MILES *v.* BARROWS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1877.

[*Reported* 122 *Mass.* 579.]

TORT for breaking and entering the plaintiff's close in Newton, removing a division fence therefrom, taking possession of a strip of land belonging to the plaintiff, and setting up a fence across his land.

At the trial in the Superior Court, without a jury, *Brigham*, C. J., found certain facts, which are stated in the opinion of the court, and ruled that the plaintiff was entitled to recover. On the question of damages, the defendant contended that the plaintiff, if entitled to recover at all, could recover only nominal damages. The judge found that the damages to the plaintiff's fence did not exceed $10; that the injury sustained by the plaintiff by being deprived of the use of his land did not exceed $5; and assessed damages in the sum of $100. The defendant alleged exceptions.

The case was submitted on briefs in October, 1876, and judgment ordered in November, 1876, overruling the exceptions. The defendant then moved for a rehearing, and upon this motion the case was argued in writing in February, 1877.

D. E. Ware, for the defendant.

J. B. Goodrich, for the plaintiff.

Morton, J. The question, upon which the liability of the defendant depends, is whether the easterly line of her lot is the line upon which the fence has stood for eighteen years or a line eighteen inches further east. This is to be determined by the construction of the deeds under which she claims, aided, so far as is competent, by extrinsic evidence.

On December 8, 1854, the defendant's lot was conveyed to John F. Boyd by two deeds, one from Samuel Jennison, Jr., guardian of John and Frank T. Richardson, and the other from Edward H. Eldredge, guardian of Ralph Eldredge. The descriptions and terms of the two deeds are the same. They conveyed to Boyd all the right, title and interest of the minor wards "in and to a certain lot or parcel of land situated in said Newton Corner on the northerly side of Elm Street, and bounded and described as follows, viz.: beginning at a point on said Elm Street two hundred and twenty-five feet westerly from land now occupied by William Whall, and running northerly at a right angle with said street one hundred and thirty-six feet, more or less, to land of the Worcester Railroad Corporation; thence on said corporation's land westerly eighty-five feet to other land of said minors and of the minor child of their sister lately deceased; thence southerly in a line parallel with the first mentioned boundary ninety-five feet, more or less, to said street; thence on said street easterly seventy-five feet to the point of beginning; said parcel containing by estimation eight thousand eight hundred and thirty-seven square feet," and being "the same on which the said Boyd has recently erected a two-story dwelling-house." After the *habendum*, the deeds contain the provision that "the said Boyd agrees to put up and maintain, without cost to said minors or either of them, suitable fences wherever the premises adjoin land owned by said minors or either of them." At this time the said minors owned the land upon the easterly and westerly sides of the lot conveyed to Boyd. The lot on the easterly side has since been conveyed to and is now owned by the plaintiff.

It appeared at the trial that, when Boyd and the grantors bargained for the lot, they agreed that a surveyor, one Woodward, should be employed to survey the lot, beginning at a point two hundred and twenty-five feet from Whall's land, and giving to Boyd seventy-five feet on Elm Street, and to ascertain the area, as the price was to be fixed by the square foot. The surveyor measured the lines, put down stakes at the corners of the lot, and made a plan of the premises, which the grantors afterwards used in drawing their deeds. Boyd, either before or upon receiving the deeds, erected fences on the lines indicated by the stakes, and he and his grantees maintained them in the same place for eighteen years. At the end of that time it was discovered that Woodward had made a mistake in the measurement of the line of two hundred and twenty-five feet from Whall's land, and had put down his stakes eighteen inches further west. And the defendant now claims that her true

easterly line begins at a point two hundred and twenty-five feet from Whall's line, and is not on the line of the fence erected by Boyd.

The question is whether this evidence was competent and would justify the finding of the Superior Court that her true line was the line of the fence.

The general principles upon which the defendant relies are not in dispute. A conveyance of land can only be by deed, and parol evidence is not admissible to control or vary a deed. If the description in it is certain and unambiguous, it is not competent to prove that the parties had any intention different from that expressed. But if, upon applying a deed to the land, it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed, and to enable the court to ascertain what was the intention of the parties in the words which they have used. This rule has been applied in a variety of cases, none of which, from the nature of things, are exactly like the present case, but which illustrate the principle. *Makepeace* v. *Bancroft*, 12 Mass. 469; *Waterman* v. *Johnson*, 13 Pick. 261; *Frost* v. *Spaulding*, 19 Pick. 445; *Stone* v. *Clark*, 1 Met. 378; *Kellogg* v. *Smith*, 7 Cush. 375; *Chester Emery Co.* v. *Lucas*, 112 Mass. 424. The defendant contends that it does not apply in this case, because the deeds to Boyd are free from ambiguity. Her argument is that these deeds fix clearly the southeast corner of the lot conveyed at a point on said Elm Street two hundred and twenty-five feet westerly from Whall's land, and that there is nothing in the deeds to control this. Whether, if there had been no allusion in the deeds to any fence or other monument, it would have been competent to show by parol that the parties, before or at the delivery of the deeds, put down stakes and built fences, intending them as monuments, we need not decide. The deeds to Boyd call for fences upon the easterly and westerly lines of the lot conveyed. It is true that the fences are not named specifically as monuments or boundaries of the lot, so that if the deeds were to be construed by themselves, without any reference to the situation of the subject of them, it might not be clear that the intention was to recognize and adopt the fences as monuments. But the fences were in fact erected at or before the time the deeds were delivered. So that, when the deeds are applied to the land, it is found that a lot is marked out by fences, referred to in the deeds, corresponding in all particulars with the description of the deeds, except that the point of beginning is eighteen inches further west than the point named in the deeds. The deeds themselves at once suggest the question whether the parties intended to convey the lot included within the fences. In other words, upon applying the deeds to the land, a latent ambiguity arises, and it is competent to show by parol that the fences were erected by agreement of the parties, and were intended to mark the monuments and boundaries of the lot conveyed. There can be no doubt, upon the facts in this case, that both parties understood and intended that the fences should be monuments defining the bound-

aries of the lot conveyed. The case is one therefore where parties, having bargained for land, marked it out and set up monuments defining its boundaries, but, by mistake, one of the distances named in the deeds does not conform to the monuments. In such a case, it is clear that the monuments control.

The defendant relies upon *Cleaveland* v. *Flagg*, 4 Cush. 76, but the two cases are clearly distinguishable. Without referring to other differences, a vital distinction exists in the fact that in that case, as stated by Chief Justice Shaw in the opinion, "no fence was alluded to in the deed, as a monument. The fence was not set up with a view to make it a monument, and there was no uncertainty respecting the true line."

We are therefore of opinion that there was no error of law in the finding of the Superior Court that the plaintiff was entitled to recover.

The question of damages was peculiarly within the province of the judge who tried the case. All the evidence is not reported, and we have neither the means nor the right to revise his finding as to the amount of damages sustained by the plaintiff.

Exceptions overruled.[1]

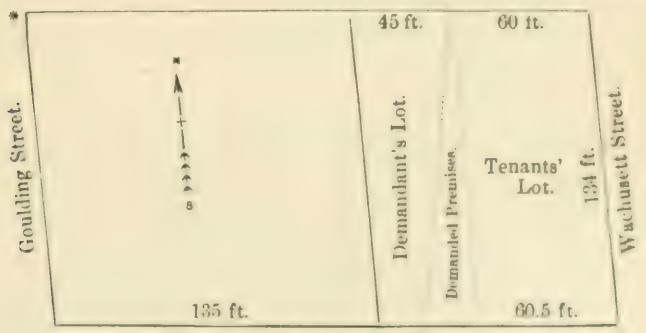
HALL *v.* EATON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[*Reported* 139 *Mass.* 217.]

WRIT of entry to recover a lot of land in the city of Worcester. Plea, *Nul disseisin*. Trial in the Superior Court, without a jury, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows: —

The land in dispute was a triangular tract on the northerly side of Dix Street, marked on a plan used at the trial, a copy of which is printed in the margin,* as "Demanded Premises." It appeared that all



[1] See *Dodd* v. *Witt*, 139 Mass. 63; p. 380, *post*.

the land lying next northerly of Dix Street and between Wachusett Street on the east and Goulding Street on the west was formerly owned by Henry Goulding, and was divided into lots and sold by his executors. The tenants' lot was at the corner of Dix Street and Wachusett Street, and the demandant's lot was part of the lot next westerly, and the question was as to the westerly boundary of the tenants' lot and the easterly boundary of the demandant's lot, under the following deeds: —

On February 20, 1869, Goulding's executors conveyed the corner lot to Blackmer and Kelley, under whom the tenants derive their title, by the following description: "A certain lot of land situated in the city of Worcester, on the westerly side of Wachusett Street and northerly side of Dix Street, bounded and described as follows, to wit: beginning at the southeasterly corner of the lot conveyed, and at the intersection of said streets; thence running northerly by Wachusett Street one hundred and thirty-four feet, to land of the heirs of Henry Goulding; thence running westerly by land of the heirs of said Goulding, sixty feet; thence running southerly by land of said heirs at right angles to said Dix Street one hundred and twenty five feet to Dix Street; thence running easterly by Dix Street sixty-one feet more or less to the first-mentioned bound, containing 7,770 feet more or less."

On October 8, 1869, said executors conveyed the residue of the land between the tenants' lot and Goulding Street to one King, by a deed which contained the following description: "Lot of land on the northerly side of Dix Street, bounded as follows: beginning at the southeasterly corner of the lot at a corner of land of Kelley and Blackmer and running westerly on Dix Street one hundred and eighty feet to a new street about to be made; thence turning and running northerly on said new street one hundred and twelve and a half feet, to land belonging to the estate of the late Henry Goulding; thence turning and running easterly on said Goulding estate one hundred and eighty feet, to land of Kelley and Blackmer; thence turning and running southerly on land of said Kelley and Blackmer one hundred and twenty-five feet, to the place of beginning on said Dix Street."

It was agreed that the new street referred to was Goulding Street, and the corner of Goulding Street and Dix Street was a known and fixed bound.

On May 8, 1871, King conveyed to the demandant a part of said lot, forty-five feet wide on Dix Street, bounded as follows: "beginning at the southeasterly corner thereof at corner of land of Kelley and Blackmer, and at a point one hundred and eighty feet distant from the easterly line of Goulding Street, thence northerly on land of Kelley and Blackmer one hundred and twenty-five feet, to land of the estate of Henry Goulding; thence westerly on said land of Goulding forty-five feet; thence southerly and parallel with the first-described line one hundred and twenty-five feet more or less, to said Dix Street; thence easterly on Dix Street forty-five feet, to the place of beginning."

The corner of Dix Street and Wachusett Street was a known and fixed bound, and the northerly line of Dix Street was a known and fixed line.

If the third line described in the deed of the executors to Blackmer and Kelley is drawn at right angles to Dix Street, it strikes a point on Dix Street eighty feet and fifty-two one-hundredths of a foot from Wachusett Street, and one hundred and sixty-one feet and ninety-four one-hundredths of a foot from Goulding Street. In such case, the tenants' line on Dix Street is eighty feet and fifty-two one-hundredths of a foot in length, and is shown by the westerly dotted line, and their lot contains 9,101 square feet.

If the third line described in said deed to Blackmer and Kelley is drawn so as to strike Dix Street one hundred and eighty feet easterly from Goulding Street, the tenants' line on Dix Street is sixty feet and a half in length, and their lot contains exactly 7,770 square feet.

The demandant offered evidence tending to show that, before the several lots were sold by the executors of Henry Goulding, they prepared a plan of them, which was produced at the trial; and it was testified by one of the executors, that the lots were sold by said plan, but there were no monuments at the corners of the lots when the deeds were given, and there was no evidence that Blackmer and Kelley saw the plan before they took their deed. Said plan showed the tenants' lot to have a line of only sixty feet and a half on Dix Street, and showed that the westerly line did not make a right angle with Dix Street.

The demandant also offered evidence tending to show that, in the year 1876, he erected a fence between his said lot and the tenants' lot (Kelley, who had bought Blackmer's interest, then being the owner of the tenants' lot), and by Kelley's consent it was placed on the line as claimed by the demandant, and remained there several years, and until removed by the tenants a short time before this suit was brought.

The demandant asked the judge to rule that it was a question of fact, on all the evidence, whether the tenants' westerly line was to be drawn at right angles to Dix Street, and asked a finding in fact that it was to be drawn at an angle to said Dix Street, so as to strike said street sixty and a half feet from Wachusett Street. The judge ruled, as matter of law, that the said line was to be drawn at a right angle to Dix Street, without regard to the evidence outside of the deeds; and found for the tenants. The demandant alleged exceptions.

F. P. Goulding, for the demandant.

H. E. Hill, for the tenants.

W. Allen, J. The courses of the lines on Wachusett Street and Dix Street are fixed on the land, and fix the angle contained by them. There is nothing on the land to fix the course of the second or of the third line, for it does not appear that the line of the land of the heirs of Henry Goulding mentioned is fixed. The description in the deed gives the length of the first, second, and third lines, which there is nothing to control, and the angle contained by the third and fourth

lines. There is no difficulty in locating this description upon the land, and it makes the length of the fourth line eighty feet and fifty-two one-hundredths of a foot, and the contents of the lot 9,401 square feet. The description in the deed gives the length of the fourth line as "sixty-one feet more or less," and the contents of the lot as "7,770 feet more or less." This discrepancy of one third in the length of the front line of the lot, and one fifth in its contents, could not have been intended, although the length and dimensions are only approximately given, and it is obvious that there is a mistake, either in the angle given, or in the length of the fourth line.

We do not regard the statement of the quantity of the land as very material. It is the computation of the contents of the figure described in the deed, but which cannot be produced on the land. The fact that to give exactly the quantity of land mentioned when the other particulars of the description are applied to the land, the third line must intersect the fourth at an obtuse angle, and the fourth line must be sixty feet and a half in length, goes to show, what is otherwise sufficiently apparent, that no such discrepancy in the length was intended. There was a mistake either in the angle given or in the length of the fourth line; they cannot both be applied to the land, though either of them may be, and the question is which must be rejected.

The question to be determined is the intention shown in the language of the deed, in the light of the situation of the land and the circumstances of the transaction, and sometimes with the aid of declarations and conduct of the parties in relation to the subject-matter. The rule that monuments, in a description in a deed, control courses and distances, is founded on the consideration that that construction is more likely to express the intention of the parties. The intention to run a line to a fixed object is more obvious, and the parties are less likely to be mistaken in regard to it than in running a given distance or by a given course. But, where the circumstances show that the controlling intention was otherwise, the rule is not applied. *Davis* v. *Rainsford*, 17 Mass. 207. *Parks* v. *Loomis*, 6 Gray, 467. *Chapman* v. *Marshall*, 9 Gray, 156. So far as the question is as to the relative effect to be given to a course and a distance, neither has in itself any advantage over the other as showing a governing intent. Whether the one in a given case shall outweigh the other, as showing the intention of the parties, must depend upon the circumstances existing at the time.

The angle formed by Dix Street and Washusett Street is an acute angle; the lot was a corner lot, the front on Dix Street. In laying it out, it would be natural either to have the third line in the description parallel to Washusett Street, or at a right angle with Dix Street. The latter is for the advantage of the purchasers. The deed shows that the parties had that, and not the other, in mind. Not only is the third line not said to be parallel with Washusett Street, but it appears that it was not intended to be. The parties understood that the angle at the corner of the streets was an acute angle, and that making the other angle

on Dix Street a right angle would require the line on that street to be longer than the rear line, and they said that the angle should be a right angle, and therefore that the line should be longer. It was not merely giving a course to the third line, but it was expressly fixing the shape of the lot. The length of the fourth line was left indefinite, and to be determined by the angle which was fixed. It is true that the given angle requires a longer line than was supposed; but the angle and the shape of the lot, and not the length of the line, appear to have been the controlling considerations. See *Nobb* v. *Googins*, 99 Mass. 231.

It is contended by the plaintiff, that it is a case of latent ambiguity, which may be explained by parol evidence. If the difference were between a given course of the third line and measurement of the fourth, it might present such a case, but neither is given. The course of the third line was not run, but it was to intersect Dix Street at a right angle; the fourth line was not measured, but its length was estimated, and apparently estimated as the distance between the point where the third line must meet Dix Street to form a right angle with it and the first corner. A mistake was made in the estimate of the distance. It would seem that the angle was so material a particular in the description of the lot, that the expressed intention in regard to it could not be made doubtful by a mistake in the estimate of the length of the fourth line, which was determined by it; but it is not necessary to decide this. As the case stood at the trial, and upon the evidence offered, the court properly ruled that, as matter of law, the third line was to be at a right angle with Dix Street, without regard to the evidence outside the deed.

The plaintiff relied upon evidence that the executors of Goulding, before the lot was sold, made a plan of this and other lots, by which it appeared that the fourth line was sixty feet and a half in length, and that the angle formed by the third line and Dix Street was an obtuse angle. This plan is not referred to in the deed, and was not seen by the purchasers. The only effect of this evidence would be to show that the grantors knew that the lot described in the deed did not correspond with the one on the plan, and did not inform the grantees.

Eight months after the conveyance to Blackmer and Kelley, the executors conveyed to one King the adjoining lot on Dix Street, extending westerly to a way to be laid out, called Goulding Street, bounding easterly on the land of Blackmer and Kelley and the line on Dix Street, and the rear lines being each one hundred and eighty feet in length. This evidence may tend to show that the executors intended that the third line of the Blackmer and Kelley lot should be parallel with Goulding Street, but such intention was not known to Blackmer and Kelley, and was not expressed or indicated in the deed to them. The demandant also relied upon evidence that King afterwards conveyed to the demandant a lot adjoining Blackmer and Kelley, described as beginning at a corner of their land on Dix Street one hundred and eighty feet from Goulding Street, and that several years after, and seven years after the convey-

ance to Blackmer and Kelley, and after Kelley had acquired Blackmer's interest, the demandant put up a fence between his lot and Kelley's, and, with Kelley's consent, put it on the line now claimed by the demandant, where it remained for several years.

We do not see that any of this evidence is competent to control the construction indicated by the deed itself. It is not sufficient to show a practical construction of the deed by the parties to it, nor an admission by the tenants' grantor which can bind the tenants, nor a mutual agreement as to the boundary, and occupation accordingly. See *Liverpool Wharf* v. *Prescott*, 7 Allen, 494; *Miles* v. *Burrows*, 122 Mass. 579; *Lovejoy* v. *Lovett*, 124 Mass. 270. Whether evidence of the construction of the deed by the acts of the parties by locating the third line on the land, or fixing the point of its intersection with Dix Street by a monument or otherwise, would present a question for the jury, we need not consider, because the evidence offered was not sufficient to show such acts, and the question presented was one of law upon the construction of the deed.

A majority of the court are of opinion that the ruling excepted to was correct.

Exceptions overruled.

B. *On Water.*

BRADLEY *v.* RICE.

SUPREME JUDICIAL COURT OF MAINE. 1836.

[*Reported* 13 *Me.* 198.]

THIS was a complaint under the Statute for flowing the complainant's land, by means of a dam, at the outlet of Flying Pond, in Vienna. At the time of the injury complained of, the lands upon the margin of Flying Pond, including the complainant's, were flowed by the dam of the defendants, more than they were by the pond in its natural state, but not more than they were at the time of the giving of the deeds in 1792, under which the complainant claims, by an old dam made by the proprietors of Wyman's Plantation, now Vienna, prior to that time. So much of these deeds as is pertinent to the present case is stated accurately in the opinion of the court. The defendants own the land, unless conveyed by the deeds under which the complainant claims.

The trial was before *Weston*, C. J., who instructed the jury, that the defendants had a right to raise the water, by means of their dam, above its natural level, but not higher than the first dam raised it in 1792, when the deeds under which the complainant claims were given. The verdict was for the defendants. If the court should determine, that this instruction was wrong, and that the complainant's title covers the land to the pond in its natural state, then the verdict was to be set aside.

R. H. Vose, for the complainant.

R. Williams and *Wells*, for the defendants.

The opinion of the court was drawn up by

Weston, C. J. The counsel for the complainant abandons in argument any claim for flowing any part of lot number eighty-five. By the deed of the westerly part of lot number eighty-four, it was bounded southerly on Flying Pond, and to extend thence northerly, until one hundred acres were completed. The easterly part of eighty-four was conveyed to run southerly to the same Pond, referring to a plan. By that plan that lot is laid down as running to, but not into, the Pond. The grantors of eighty-four had previously, by a dam, raised the waters of the Pond above its natural margin, for the purpose of creating a reservoir, to feed their mills.

The first question presented is, whether by these deeds, under which the complainant derives title, Flying Pond is made a boundary, as it then was, or in its natural state. And we are of opinion, that the Pond, as it then was, was the monument contemplated and intended by the parties. The accumulation of water created by the dam, and that which had naturally collected, formed one aggregate. By the pond must be understood the whole collection of water, as it then existed, and as it presented itself to the eye. So if instead of extending its margin by a dam, the limits of the pond had been contracted, by deepening its outlet, land subsequently conveyed, bounded on the pond, would extend to its new margin.

To, from, or by, are terms of exclusion, unless by necessary implication, they are manifestly used in a different sense. This is clear, where land is conveyed bounded by the land of A. and running from the land of B. to that of C. But it is contended, that although lot number eighty-four runs to, and is bounded by the pond, it is not limited to its margin, but runs by construction of law to its thread or centre. It is true, that where land is bounded on a river or stream, where the tide does not ebb and flow, the owner's title by construction of law, extends to the centre or thread of the stream. But Flying Pond is not a river or stream. No case has been cited, nor have we found any, where that rule of construction has been extended to a pond or lake. Neguasset Pond, which was the subject of discussion in *Hathorn* v. *Stinson et als.*, 1 Fairf. 238, was a mere expansion of Neguasset river or stream. In that case, Parris, J., in delivering the opinion of the court, says, "the law of boundary, as applied to rivers, would no doubt be inapplicable to the lakes, and other large natural collections of fresh water, within the territory of this State. At what point its applicability ceases, it is unnecessary now to consider, as the case does not call for it."

The proprietors of the pond and of the contiguous lands, when they sold, to the pond, must have intended to reserve that as a reservoir for the purposes, to which it had been appropriated. They used a term of exclusion. Their intention and meaning is thereby manifested.

Had the land been bounded upon a river or stream, or upon an artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream. This is law well settled and understood. But it has not been so settled, with regard to ponds and lakes. Nor are we aware, that there can be one construction for small ponds or lakes, and another for large ones. Where shall the line be drawn? At what point does the one construction end, and the other begin? In the absence of any direct authority, for extending by construction the bounds, which the grantors have prescribed in the deeds under consideration, we do not feel at liberty to do so, from any supposed analogy between streams and ponds. It is, to say the least of it, of very doubtful application. The grantees were carried to the pond; and we are not satisfied that they, or the complainant under them, has any right to go further.

In *Waterman* v. *Johnson*, 13 Pick. 261, the court held expressly, that land bounded on a natural pond, went no farther than the margin of the water. The construction, now urged for the complainant, was not there even contended for; although it would have been decisive of the cause. *Judgment on the verdict.*

LOWELL *v.* ROBINSON.

SUPREME JUDICIAL COURT OF MAINE. 1839.

[*Reported* 16 *Me.* 357.]

TRESPASS *quare clausum*, for cutting and taking away the plaintiff's grass. The facts in relation to the title of the respective parties by deed appear in the opinion of the court. Jones entered into possession within twenty years under his mortgage, by judgment of court, and foreclosed the same, and the defendants had the title of Jones. Nathan Hanscomb, under whom both parties claimed, was released by the plaintiff, and testified, that he never claimed the meadow lot under Scott, his grantor of certain lands, and, as the defendants contended, of the meadow, but by possession only, and that he had been in possession by cutting the grass annually for thirty-nine years prior to his deed to the plaintiff, and had fenced this and other land of his from the road. The case states, that it was proved by the plaintiff, and not objected to by the defendants, that when the lot described in the deed from George Scott to said Nathan Hanscomb, was laid out in 1797 by the committee of lot layers appointed by the proprietors of the township, they were requested by said Hanscomb to include the meadow with the upland, and that the committee then refused to include the meadow, and made their bounds at the monuments by the side of the mill-pond, as described in his deed from George Scott; and it was also proved by certified copies from the proprietors' records of 1770, that the first division

rights were to be laid out exclusive of marsh, and that the fresh meadows in the township were laid out in separate and distinct lots by themselves in 1800.

At the trial, before *Shepley*, J., the plaintiff requested the judge to instruct the jury, that the plaintiff and those under whom he claimed, having been in quiet possession of the meadow for forty years, claiming it as their own and mowing it annually, may maintain trespass against any person, even the former rightful owner of the soil; and that the farm occupied by the defendants, being bounded in front by fixed and durable monuments, to wit, the stake by the side of the mill-pond near the bridge on the meadow brook, and an ash tree by the side of the mill-pond, and running from one of those monuments by the side of the mill-pond to the other, they cannot hold beyond the monuments and the side of the mill-pond as it is during the usual spring freshets. The judge instructed the jury, that the plaintiff had no title to the meadow, because it had been previously conveyed to Jones, and could not recover for the grass cut thereon; but if there had been a cutting proved on the land purchased of Ellesmere, he might recover therefor. The jury returned a verdict for the plaintiff, assessing the damages at four dollars.

If the instructions were correct, judgment was to be rendered on the verdict; and if not, a new trial was to be granted.

The case was argued in writing.

Lowell, pro se.

Mellen, for the defendants.

The opinion of the court was drawn up by

SHEPLEY, J. It is too well settled to admit of doubt, that when land is bounded upon a river or stream, the grantee will hold to the thread of the stream. Nor is there any doubt that land may be so bounded upon the bank, or by monuments standing near but without the edge of the stream, as to exclude the stream from the conveyance. When the monument is stated to stand by the river or by the edge of the river, the same idea is communicated as if it had stated, that the line of boundary commenced by the river or by the edge of the river, instead of at the monument thus standing, unless from other parts of the conveyance it should clearly appear, that such was not the intention.

The case finds, that the premises in controversy are meadow lands flowed during the spring of the year by a mill-dam across the river below, but not so flowed during the summer season.

Both parties derive their title from Nathan Hanscomb, the defendants having the elder title; and the question is, whether the premises had been conveyed by him before he conveyed them to the plaintiff. And that is to be determined by the construction put upon the deeds, unless the language is so ambiguous as to authorize the aid of parol testimony. The deed from Hanscomb to Jones, under whom the defendants claim, begins the line of boundary at meadow brook, "at a stake *by the side* of the mill-pond;" the other lines being described, it returns "to a

stake *by the side* of the river or mill-pond, thence *by the said pond* to the first mentioned bounds."

It will be perceived, that the line in effect commences by the side of the mill pond, returns to the side of it, and runs by it from one point to the other. It is said, that this deed may be explained by the deed from Scott to Hanscomb of the same lands. The line as described in that deed begins at meadow brook, "at a stake *by the side* of the pond;" and the other parts being described, it returns "to an ash tree *by the side* of the mill-pond, then *by the side* of the mill-pond to the first mentioned bounds." The only difference perceived where the line is adjoining the pond is, that one deed describes it as running *by the pond* and the other *by the side* of the pond; and the difference in the words, does not communicate any difference of intention. In neither is the line disjoined or separated from the pond; and such language when used with reference to a river or stream, not flowed into a pond, would not admit of doubt.

In the case of *Hathorne* v. *Stinson*, 3 Fairf. 183, it was decided by this court, that a lot of land bounded upon a pond artificially raised by the flowing of a stream by a mill-dam, was not limited to the margin of the pond, but included the land thus flowed. The same opinion is expressed in the case of *Waterman* v. *Johnson*, 13 Pick. 261, with a possible qualification, that the pond may have acquired by becoming permanent another well defined boundary. The pond named in these deeds cannot be regarded as having acquired a permanent boundary, for the case finds, that it yearly ceases to exist, the water being confined within the banks of the river.

As the land is clearly bounded by the mill-pond, a well established rule of construction carries it to the centre of the stream thus flowed, and parol testimony cannot be admitted for any other purpose, than to make known the kind of pond described as a mill-pond. For this purpose it may be admitted, for if it had been a natural pond not artificially raised by the flowing of a stream, the title would have been limited by the margin of the water, as decided in the case of *Bradley* v. *Rice*, 13 Maine R. 198.

The facts do not show such a disseisin of this close committed and continued against the owner as to authorize an action of trespass to be maintained against him.

Judgment on the verdict.[1]

[1] See *Munsar* v. *Bird*, 62 Me. 38.

STARR *v.* CHILD.

SUPREME COURT OF JUDICATURE, AND COURT FOR THE CORRECTION OF ERRORS OF NEW YORK. 1838, 1842.

[*Reported* 20 *Wend.* 149 ; 4 *Hill*, 369.]

THIS was an action of ejectment, tried at the Monroe Circuit in October, 1835, before the *Hon. Addison Gardiner*, then one of the circuit judges.

The plaintiffs claimed title to the premises in question on the following state of facts: It was admitted that previous to the 13th August, 1817, Charles Carroll, William Fitzhugh and Nathaniel Rochester were seised of a tract of 100 acres of land covering the premises in question, and that both plaintiffs and defendants claim under that title. The plaintiffs then produced in evidence, 1. A *partition deed* between Carroll, Fitzhugh and Rochester of the above tract, bearing date 13th August, 1817, by which *mill-seat lot number twelve* (the premises in question), among other parcels, was allotted to Rochester; 2. A second partition deed between the same parties, bearing date 19th September, 1822, whereby certain alterations were made in the *numbers* and *size* of various mill-seat lots; and other mill-seats laid out and divided between them; 3. A deed from Rochester to William Cobb, bearing date 9th November, 1819, conveying "All that certain piece or *parcel of mill-seat lot No.* 12 in the village of Rochester, beginning at the northwest corner thereof *on the south bounds of Buffalo Street*, running thence southwardly along the east bounds of the mill-yard and at right angles with Buffalo Street 30 feet; thence eastwardly parallel with Buffalo Street *about* 45 *feet to the Genesee River;* thence northwardly *along the shore of said river to Buffalo Street;* thence along the south bounds of Buffalo Street westwardly to the place of beginning: *together with the privilege of taking water from the present mill-race* near the mill now occupied by Bissel & Ely; such water to be conveyed in front of and near the said mill and *below the surface of the ground*, to be kept well covered so as not to obstruct the passage and use of the mill-yard, &c. &c." (prescribing the quantity of water to be used; giving a right in common to the use of the *mill-yard* fronting the mill occupied by Bissel & Ely and extending to the said lot number *twelve;* and subjecting the grantee to a proportion of the *expense of repairs* on the dam and raceway, &c. &c.); and 4. The plaintiffs produced in evidence a deed from the said Nathaniel Rochester to *Thomas Morgan* bearing date on the same day with the deed last mentioned, conveying the *residue* of the said mill-seat lot No. 12 to the grantee, in which the premises conveyed are described as beginning at the *southwest corner* of the premises conveyed to *Cobb*, running thence southwardly along the east bounds of the mill-yard 25 feet; "thence eastwardly along the north bound of an alley

and parallel with Buffalo Street *to the Genesee River* (nearly fifty feet); *thence northwardly along the shore of the Genesee River* to William Cobb's corner;" thence to the place of beginning. "*Together with the privilege of taking water from the present mill-race*," &c. &c. (containing the same provisions as in the deed to Cobb). After the production of those deeds, the plaintiffs deduced a regular title under the same to themselves. The judge charged the jury that upon a true construction of the deeds executed by Rochester to Cobb and Morgan, the grantees *had obtained title to the centre of the Genesee River*, and that title having become vested in the plaintiffs, he directed the jury to find a verdict for them, which they did according to such direction. The defendants having excepted to the charge of the judge, now moved for a new trial.

S. Beardsley (Attorney-General), for the defendants.

O. Hastings, for the plaintiffs.

By the Court. (Cowen, J.) The counsel for the plaintiffs adverted on the argument to the evident purpose for which this lot No. 12, with other lots, were laid out along the river, among the original proprietors. He insisted, that granting them as *water-lots* looked to the enjoyment of hydraulic privileges; and it would, no doubt, be strange, that after deliberately arranging and conveying lots for such an object, the law should cut off the purchasers from the river, by a puzzledom to be raised on a few equivocal words in the grant.

But there is no necessity for looking to extrinsic circumstances. There can be no question, that the deeds to Cobb & Morgan, on their face, invested them with a fee simple in the *bank* of the river. The south line runs about 42 feet *to the Genesee River*, thence northwardly, *along the shore of the said river to Buffalo Street*; and it is insisted by the counsel for the defendants, that these latter words are so strong, as to subvert the plain meaning of the former words *to the river*, and tie up the grant to the shore. But suppose we were to expunge the words *to the river*, and take the *shore* as the boundary: the grantees became proprietors of the *shore*; which, when applied to a fresh water river, means the *bank*. Johns. Dic., quarto. *Shore* and *bank*, signifies the earth arising on each side of the water. Id. Bank. And then, says Sir John Leach, V. C., *Wright* v. *Howard*, 1 Sim. & Stu. 203, "*Prima facie*, the *proprietor* of each *bank* of a stream is the proprietor of half the land covered by the stream." The *bank* and the *water* are correlative. You cannot own one without touching the other. But the *bank* is the principal object; and when the law once fixes the proprietorship of that, the soil of the river follows as an incident, or rather as a part of the subject matter, *usque ad filum aquæ*. Lord Hale puts it that fresh rivers do, *of common right*, belong to the owners of the soil adjacent. De Jure Maris, ch. 4; 6 Cowen, 547. The law does not stop to criticise the words by which a man is made owner: it inquires, Is he the *shore* owner? If that be so, he touches the water. *Per* Marshall, C. J., in *Handly's Lessee* v. *Anthony*, 5 Wheat. 385. It is conceded that

the words *to and along the river*, would include the stream. What difference, I ask, between that and *to and along the shore?* A difference of words signifying the same thing. In either case, taken literally, and according to common understanding, they carry you to a line intermediate the water and the land, and touching both. How do they take more? Upon construction of law, which does not require express words for the grant of every part, as houses, fences, mines, or the elements of water or air, which all pass by the word *land;* and, as a grant of land by certain boundaries, *prima facie* passes all such parts to the grantee, *usque ad cœlum et ad inferos;* so, within the same principle, it passes the adjoining fresh water stream, *usque ad filum aquæ*. The passing of the one kind may just as well be questioned as another, not only in the eye of the law, but of common-sense and reason. Within the first maxim it is said, one shall not build so as to overhang another's premises, darken his lights, or confine the air: and surely it would be more absurd for the law to give a man the shore or side of a fresh water river; and yet, by saving the bed to the grantor, make the owner of the land a trespasser, every time he should slake his thirst or wash his hands in the stream. In *Gavit's Administrators* v. *Chambers*, 3 Ohio Rep. 495, a case by which the Supreme Court of the State of Ohio adopted the doctrines of Lord Hale, they say, "a river consists of water, bed and *banks*." By running up or down, or along either, therefore, you touch the river within this case. I have said that *along the shore* is the same thing. I admit it is not critically correct to say, the *shore* of a river. The term belongs in its strict sense to the ocean. Dr. Johnson says, it applies to a river only in a secondary, or, as he calls it, a *licentious* sense. "Beside the fruitful *shore* of muddy Nile." Johns. Dict., 4to. *Shore*. Yet it is sometimes so applied in legal proceedings. The compact between Virginia and Kentucky speaks of the *shores* of the Ohio; which word *shores* was treated by C. J. Marshall, in *Handly's Lessee* v. *Anthony*, as the same with *side* or *bank*. We know it means the same in common understanding among us, which must govern in the construction of a conveyance.

It is true that parts of the thing may be excluded or excepted from the grant, or may exist in separate hands by prescription; or they may be granted by name together with the land; but in no case does the mere omission to mention them operate as an exclusion. No matter how particularly the area of the land may be described; no matter how definitely bounded, it will carry every part, whether above, below, or collateral. That this rule in respect to the soil of fresh water rivers has long practically prevailed, may be seen in the books and authorities which I collated in 6 Cowen, 543 to 551. It follows, also, I think, conclusively from the cases there cited, that if there be an exception or exclusion of the part, the burden of showing that, lies on the side of the party who affirms it. The exception is to be raised like that to the right of using a stream running across another's farm. It may be expressly reserved for the grantor's mill below, or there may be an adverse user of twenty

years, &c. all of which is very fully considered in many cases. There is but one difference between a stream running by the side of a man's farm and one which runs through it; in the former case he of course owns but half, and in the latter the whole of the ground covered by the stream. In *Gavit's Administrators* v. *Chambers*, the plaintiffs had taken possession of the bed of the Sandusky River, built a mill, and sued the defendants for building below and flowing back the water upon the mill. The defendants denied that the plaintiffs owned the bed of the stream: for they claimed under a conveyance from the United States bounding them on the bank; and, indeed, the area of the river to high water mark was deducted by the United States, and only lands on the shores paid for. Yet the bed of the stream was held to pass. Here was everything but an express exception by the United States. They had included the river in their surveys; but deducted the bed from the price and bounded the patentee on the banks. Yet what say the court? They ask, "At what point does the right of the owner of the adjoining lands terminate? on the top or at the bottom of the bank? at high or at low water mark? does his boundary recede or advance with the water, or is it stationary at some point? and where is that point? who gains by alluvion, who loses by the direptions of the streams? No satisfactory rules can be laid down, in answer to these questions, if the common law doctrines be departed from; and, if it be assumed that the United States retain the fee-simple in the beds of our rivers, who is to preserve them from individual trespasses, or determine matters of wrong between the trespassers themselves? It cannot be reasonably doubted that if all the beds of our rivers supposed to be navigable, and treated as such by the United States in selling the lands, are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste would fall into endless broils amongst themselves, and involve the owners of adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects for individual scramble, necessarily leading to violence and outrage." The picture is a strong one; but it comes short of the life, if we apply the strict construction there contended for by the defendants to the *water lots* of the Genesee at Rochester, and the hundreds of other streams in our manufacturing districts. It is said by Chancellor Kent, speaking of the cases cited in 6 Cowen, 544, "They demonstrate the existence of the rule that a grantee bounded on a river (and it is almost immaterial by what mode of expression), goes *ad medium filum aquæ*, unless there be decided language showing a manifest intent to stop short at the water's edge." 3 Kent's Com. 429, 3d ed. note. We may ask, looking at the whole of the books and the honesty of the transaction, what ought the grantor, whether United States, State or individual, to do when the patent or grant extends to the shore, but the grantor yet means to except so important a part as the adjoining stream? The obvious answer is, Let the grant state the exception in terms. Otherwise, as the law has long

been understood, the allowance of an exception would operate as a fraud, gross in its character, and dangerous to a very large portion of the community.

There will be seen, moreover, a very distinct and strong tendency in the cases I have cited, to turn every doubt upon expressions which fix the boundary next the river, in favor of a contact with the water. The words which in those cases and others have created the most frequent difficulties are where the *termini* of the river line stand on the bank at some distance from the stream, and the line is prescribed to run between them, "along the river," or "up the river," or "down the river," or the like. It has been contended in such cases that the call may well be satisfied by a direct line between the *termini*, irrespective of the immediate margin; or by following at a distance from the margin, the meanders of the stream, where the words require that. But all such language has been held to fix the boundary upon the river. *Rogers* v. *Mabe*, 4 Dev. 194, 195, and the cases there cited. And see *McCullock's Lessee* v. *Aten*, 2 Ohio R. 307, and *Fleming* v. *Kenney*, 4 J. J. Marsh. 157. These cases show, what it is very difficult for the human mind to resist, that the parties never mean to leave a narrow strip between the land and the river, merely because some stake or tree, or even all the stakes and trees of the line, stand at a slight distance from the river. The expression of an intent to run the line along the *stream*, reaches a distinct natural monument, which overcomes the others. They are rather intended to indicate or point down to the *termini* of the water line. In *McCullock's Lessee* v. *Aten*, the court say, "the boundaries described as corners are found at a considerable distance from the water's edge." One of the *termini* was an oak tree, and the other a post; and the line was to run between these *down the creek with the several meanders thereof*, 207 perches. The court say it is not unfrequent that both corner and line trees stand at a greater or less distance from the actual line. "The nearest and most permanent trees are usually marked. A tree marked as a corner upon the bank of a stream, never can stand upon the water line at low water mark; and where the call is for the meanders of a stream, the corner is not supposed to be exactly in the line. The fact that the marked corner called for stands *four rods* from the water, does not create any ambiguity in the terms *down the creek with the several meanders thereof*. They import the water's edge, at low water, which is a decided natural boundary, and must control a call for corner trees or stakes upon the bank." I am unable to perceive any difference between the words there used and the words in the deed to Cobb, "along the shores of said river to Buffalo Street," and even had both *termini* of this *water line* stood at a short distance from the river, still the *shore*, the immediate side of the river, would have been the conspicuous and controlling monument, within the case of *McCullock's Lessee* v. *Aten*. This great anxiety to connect water with the main premises in the conveyance, and give a right of entry for its full enjoyment, runs through the whole history of the law. If it cannot give the

land under water as parcel of the grant, it will save the water alone as an appurtenance. Thus in *Nicholas* v. *Chamberlain*, Cro. Jac. 121, it was held, "that if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to his house, and afterwards sell the house with the appurtenances, even though he except the land, yet the conduit and pipes pass with the house, because it is necessary, *et quasi* appendant thereto."

But the grants to Cobb and Morgan were not embarrassed by any monuments, having the appearance of conflict with the lowest verge of the shore. The south line runs to the *river* itself, and then northwardly along its *shore* to the street. It is said the street terminates at the bridge, which extends out and meets the street a short distance from the river, and that the latter *terminus* must therefore be a like distance from the river. But there is no such fact apparent upon the case. *Non constat*, but the bridge may be a continuation of the street; and probably such is the fact. That being so, it is impossible to distinguish this from the case of *Jackson* v. *Louw*, 12 Johns. R. 252, 255. There the line ran *to the creek, and up the same* to a certain point. The court said, "the terms, *and up the same*, necessarily imply that it is to follow the creek according to its windings and turnings: and *that must be in the middle or centre of it*. The rule is well settled, that when a creek not navigable, and which is beyond the ebb and flow of the tide, forms a boundary, the line must be so run." So in *Fleming* v. *Kenney*, the court said the expressions, "*beginning on the bank of the creek*, thence up the creek, with its meanders, import literally, that the *margin of the creek* is the boundary." Thus, I think, we are brought clearly to the river, and are continued there. And we have seen the settled common law consequence, the soil passed *usque ad filum aquæ*; and a new trial should be denied.

New trial denied.[1]

The case was brought by writ of error before the Court for the Correction of Errors, and was argued by the same counsel.

WALWORTH, CHANCELLOR. The decision of a majority of this court in the case of *The Canal Appraisers* v. *The People ex. rel. Tibbitts*, 17 Wend. 590, although put upon other grounds by some of the members who voted for a reversal of the decision of the Supreme Court, cast a shade of doubt upon the question whether the common law rule prevailed here as to the construction of conveyances of lands bounded by or upon a river or stream above tide waters. That doubt, however, is probably removed by the recent decision of this court in the case of *The Commissioners of the Canal Fund* v. *Kempshall*, 26 Wend. Rep. 404, in which the judgment of the Supreme Court in favor of the riparian owner was unanimously affirmed. The common law rule, as I understand it, is that the riparian proprietor is *prima facie* the owner of the *alveus* or bed of the river adjoining his land, to the middle or

[1] BRONSON, J., dissented; his opinion is omitted.

thread of the stream; that is, where the terms of his grant do not appear and show that he is limited. And when by the terms of the grant to the riparian proprietor he is bounded upon the river generally as a natural boundary, or, in the language of Pothier, where the grant to the riparian proprietor has no other boundary on the side thereof which is adjacent to the river but the stream itself, the legal presumption is that his grantor intended to convey to the middle of such stream; subject to the right of the public to use the waters of the river for the purposes of navigation in their accustomed channel, where they are by nature susceptible of such use. It has also been decided that the same principle applies to the construction of grants bounded generally upon highways, party-walls, ditches, &c., which constitute natural boundaries between the lands granted and the adjacent property. Thus, in *Jackson* v. *Hathaway*, 15 John. Rep. 454, although by the terms of the grant in that case the Supreme Court considered the whole of the highway as excluded, Mr. Justice Platt, who delivered the opinion of the court, says: "Where a farm is bounded *along* a highway, or *upon* a highway, or as *running to* a highway, there is reason to intend that the parties meant the middle of the highway." So in *Warner* v. *Southworth*, 6 Conn. Rep. 471, 474, where the grantor had divided one of his lots from another by an artificial ditch and embankment, and afterwards conveyed one of those lots by a deed which bounded it upon the ditch generally, without any words of restriction, the Court of Errors in our sister State of Connecticut decided that the grant extended to the middle of the ditch. And Judge Daggett, in delivering the opinion of the court in that case, says: "Doubtless had the boundary line been a stone wall, six feet in width at the bottom, the grant would have extended to the centre of it." (See also 3 Kent's Com. 432.)

Although this principle exists as to the construction of grants which are unrestricted in their terms, and also as to the legal presumption of ownership by the riparian proprietor where from lapse of time or otherwise the terms of his grant from the former or original proprietors cannot be ascertained, there can be no doubt of the right of the general owner of the bed of the river, as well as of the land upon its banks, so to limit or restrict his conveyance of the one as not to divest himself of his property in the other. Lord Chief Justice Hale, in his learned treatise De Jure Maris, &c., admits that the *prima facie* presumption of ownership of the bed of the stream by the riparian proprietor may be rebutted by evidence that the contrary is the fact. He says, "one man may have the river and others the soil adjacent, or one may have the river and soil thereof, and another the free or several fishing in that river." (See Harg. Law Tr. 5.) And the learned and venerable commentator upon American law says, it is competent for the riparian proprietor to sell his upland to the top or edge of the bank of a river, and to reserve the stream or the flats below high water-mark, if he does it by clear and specific boundaries. (3 Kent's Com. 434.) This was also expressly decided by Mr. Justice Washington in the Circuit Court of the

United States for the Third Circuit, in the case of *Den* v. *Wright*, Peter's C. C. Rep. 64, where the owner of the *alveus* or bed of the creek, and also of the adjacent land upon the south bank thereof, had conveyed 29 acres in the bed of the creek, bounded by the sides of the same, without any of the land upon either of the adjacent banks. In the case of *Pumply* v. *Stetson*, 4 Mason's Rep. 349, in the Circuit Court of the United States for the First Circuit, where the lands granted, instead of being bounded on the Penobscot River generally, were described as commencing at a stake and stones on its west bank, and after running on the other sides of the lot certain courses and distances to another stake and stones on the same bank of that river, and thence *upon the bank at high water-mark*, to the place of beginning, Judge Story decided, that the flats between high and low water mark were not conveyed by the deed; although by a colonial ordinance, which was recognized as the existing law of the State, grants bounded generally upon tide waters carried the grantee to low water-mark. A similar decision was made by the Supreme Court of Massachusetts in the case of *Storer* v. *Freeman*, 6 Mass. Rep. 435. In that case one of the conveyances described the lines as running to the *shore* of Gamaliel's Neck, and thence *by the shore* &c. And in the other deed these lines were described as running to a heap of stones *at the shore* of the neck, and thence *by the shore* to the land conveyed by the first deed. And in the case of *Hatch* v. *Dwight*, 17 Mass. R. 298, the same court decided that where land was bounded by the *bank* of a stream, it necessarily excluded the stream itself. In delivering the opinion of the court in that case, Parker, C. J., says, that the owner may undoubtedly sell the land without the privilege of the stream, "as he will do if he bounds his grant by the bank."

Running to a monument standing on the bank, and from thence running *by the river* or *along the river* &c., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the directions of the lines *to the river*, and not as restricting the boundary *on the river*. If the grantor, however, after giving the line to the river, bounds his land by the *bank* of the river, or describes the line as running *along the bank* of the river, or bounds it upon the *margin* of the river, he shows that he does not consider the whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river. And it appears to me equally clear that the grant is restricted where it is bounded by the *shore* of the river, as in the present case.

The shore of tide water is that portion of the land which is alternately covered by the water and left bare by the flux and reflux of the tide. Properly speaking, therefore, a river in which the tide does not ebb and flow has no *shores*, in the legal sense of the term. It has *ripam*, but not *litus*. The term "shores," however, when applied to such a river, means the river's banks above the low water-mark; or rather, those portions of the banks of the river which touch the margin or edges of the

water of the stream. A grant, therefore, which is bounded by the *shore* of a fresh-water river, conveys the land to the water's edge, at low water; and, as in the case of lands bounded upon tide waters, that boundary of the grant is liable to be changed by the gradual alterations of the shore by alluvial increment, or the attrition of the water.

The fact that the premises conveyed in this case are described in the deeds as mill-lots, cannot operate to extend the grants into the *alveus* or bed of the river. For the deeds also show that the contemplated mills were to be supplied with water from the mill race already constructed; and not by water to be taken out of the Genesee River, opposite the lots granted. And the right to discharge the water into the river, after it has been used to propel the machinery on the mill-lots, is at most but an easement; not requiring for its enjoyment the ownership of any part of the bed of the stream by the grantees. Upon the question, therefore, whether the bed of the river passed by those deeds, I concur with Mr. Justice Bronson, in the opinion given by him in the court below, dissenting from the conclusion at which his two associates on the bench had arrived.

For that reason I shall vote to reverse the judgment of the Supreme Court, and to award a *venire de novo*; to the end that the jury may ascertain the part of the premises in controversy above ordinary low water-mark, if any, which was in possession of the defendants in the court below at the time of the commencement of this suit. And if a majority of the court should concur with me in supposing that the judgment which was rendered by the Supreme Court should be reversed, it appears to be a case where the costs of this writ of error may very properly be left to abide the event of the suit upon the *venire de novo* which must then be awarded.

On the question being put, "Shall this judgment be reversed?" the members of the court voted as follows: —

For reversal: The PRESIDENT, the CHANCELLOR, and *Senators* CLARK, ELY, FRANKLIN, PECK, ROOT, SCOTT, STRONG, VARIAN, and VARNEY — 11.

For affirmance: Senators BARTLIT, BOCKEE, DENNISTON, DIXON, HUNT, JOHNSON, NICHOLAS, PLATT, RUGER, and WORKS — 10.

Judgment reversed.[1]

[1] The opinions of the PRESIDENT (BRADISH) and SENATOR BOCKEE are omitted.

LUCE *v.* CARLEY.

SUPREME COURT OF JUDICATURE OF NEW YORK. 1840.

[*Reported* 21 *Wend.* 451.]

ERROR from the Cortland C. P. Carley sued Luce in *trespass*, for tearing down part of a *dam* across the Onondaga River, by means of which dam the mill of the plaintiff was supplied with water. The plaintiff was the owner of the land on the *west side* of the river, and Amos P. Granger (under whom the defendant acted) the owner of the land on the *east side* of the river at the place, where the dam butted on the shore. The river at that point is about ten rods wide, and the portion of the dam destroyed was within thirty feet of the east shore. In 1815 Parley P. Wood, who derived his title from one Barnabas Wood, was the owner of the *east* shore, and John Smith the owner of the *west* shore, and in that year John Smith, by the *license* of Parley P. Wood, extended the dam by continuing it from an island in the river to the east shore, a distance of about thirty feet. In 1829, John Smith sold his property on the west shore of the river to William Smith and another person, conveying to them a right to the dam, extending the whole distance to the east shore of the river, and in 1833 the property thus described came to the plaintiff by sundry mesne conveyances. The plaintiff, since his purchase, used the dam and annually repaired it. On the other hand, Parley P. Wood conveyed his property, in 1832, to Daniel Wood, who in 1835 conveyed it to Amos P. Granger. Barnabas Wood, grantor of Parley P. Wood, derived his title by deed from J. and S. Currey, bearing date 10th August, 1806. The premises conveyed contained about three hundred acres of land. One of the courses in the description of the premises ran to a hemlock stake "standing on the *east bank of the river*, from thence down the river *as it winds and turns*, twenty-four chains and ninety-four links, to a hard maple tree," &c.; and the deed from Barnabas Wood to Parley P. Wood describes the premises conveyed as "Beginning at a hard maple tree standing on *the east bank of the Onondaga River*," and then, after giving a course and distance *east*, and another *north*, proceeds as follows: "thence *west* fifty chains and ten links to the *east bank* of the Onondaga River, (and) thence *south along the Onondaga River* to the first mentioned bounds, containing," &c. Upon this state of facts the court charged the jury that the possession of the dam by John Smith and William Smith was not adverse to Parley P. Wood and those claiming under him; it was apparent that their possession was conventional and not adverse. But if they (the jury) should be of opinion that the plaintiff, when he bought the mill and dam and went into possession, supposed and believed that he had procured a full and absolute title to the same, as described in his deeds, in good faith and without

notice of the parol agreements and understandings between Parley P. Wood and John Smith and William Smith, then the plaintiff's possession would be adverse, (although the possession of those from whom he purchased was not adverse,) and the deed from Daniel Wood to Amos P. Granger would be void *pro tanto*. To which charge the counsel for the defendant excepted. The jury found a verdict for the plaintiff, on which judgment was entered. The defendant sued out a writ of error.

H. Ballard and *J. D. P. Frear*, for the plaintiff in error.

W. H. Shankland, for defendant in error.

By the Court. (Cowen, J.) It is impossible to read the bill of exceptions, without at once concurring with the court below, that, independently of the question of adverse possession in the plaintiff, when Granger, the defendant's principal, took his deed in 1835, he had a complete title to the soil on the east side of the Onondaga River, *usque ad filum aquæ*. The deed from the Curreys bounded Barnabas Wood by a stake and maple tree mentioned in the deed as standing on or near the east bank, the intermediate line running along the river as it winds and turns. It is never thought that monuments mentioned in such a deed as occupying the bank of the river are meant by the parties to stand on the precise water line at its high or low mark. They are used rather to fix the *termini* of the line which is described as following the sinuosities of the stream, leaving the law to say, as the line happens to be above or below *tide water*, whether the one half of the river shall be included, with the islands which lie on the side of the channel nearest to the line described. Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, if it be above tide, one half the bed of the stream is included by construction of law. If the parties mean to exclude it, they should do so by express exception. Without adhering rigidly to such a construction, water gores would be multiplied by thousands along our inland streams small and great, the intention of parties would be continually violated, and litigation become interminable. In these grants, which bounded each side of the Onondaga River, the earlier proprietors, it seems, understood their rights to be precisely what the common law declared them to be; and when the Smiths desired, in 1814 or 1815, to avail themselves of a dam on Parley P. Wood's side of the island, they made application to him for *license* to extend it, and a full and friendly understanding was entered into by *parol*. The Smiths had leave to extend their dam, and Wood was to have the benefit of it for the purposes of such machinery as he might afterwards choose to erect; nay, the Smiths explicitly recognized Wood's title to the island, by first offering to purchase it. Failing in that, they submitted, and extended their dam under the *parol license*. Clearly, the court below could not do otherwise than hold the Smiths bound by that arrangement. They did not put it too strong to the jury, when they said that any claim of title by the Smiths, after thus coming in conven-

tionally under Wood, could not raise an adverse possession as against him or any person claiming under him. That the court below gave the grant to Barnabas Wood a construction by no means too comprehensive, may be seen by the late case of *Starr* v. *Child*, 20 Wendell. 149, 156 to 158, and the books cited in that case; and the effect of a clear paper title recognized and acted upon by the Smiths, they taking under it by express agreement the right to run their dam from the island to the eastern bank, was obviously not overrated. They at least were concluded against alleging an adverse possession. *Colvin* v. *Burnet*, 17 Wendell, 564, 568, 9, and the cases there cited; *Hart* v. *Vose*, 19 Id. 365; *Parker* v. *Foote*, Id. 309; *Butler* v. *Phelps*, 17 Id. 642.

We think also that the court were bound to regard the successors of the Smiths as in the same case with them, whether such successors came in with or without notice of the arrangement. The court erred, therefore, in charging that the jury might find an adverse possession in the plaintiff. It is going far enough to say that a squatter, a man presumptively holding in privity with the true owner, may raise an adverse possession in his grantee by an absolute conveyance. Such an act may be received as evidence to overturn the presumption; and I take that to be the only principle on which even the naked possessor can work an ouster by his deed to another. In the case at bar, there was no room for presumption, any more than if the Smiths had taken a lease of Wood. Suppose the license to extend the dam had been in writing or under seal. It would have derived no greater force from either circumstance. It could have taken no firmer ground, nor have been more available, except in the facility and durability of the evidence by which it might be established. Yet no one would suppose in such a case, that possession of the owner could be disturbed by any adverse act of the person holding the license, any more than if he were a lessee. In both cases his possession would be the possession of the true owner; his grantee steps into the shoes of his grantor; he takes *cum onere*. A lease to his grantor is a lease to him, and so of a license; so of everything by which the grantor has encumbered or qualified his estate. Verdicts, answers in chancery and other admissions of the grantor are all evidence against the grantee. They affect him in the same degree as they would his grantor, if they had been brought to act immediately on him. *Vid. Brandler* d. *Fitch* v. *Marshall*, 1 Caines, 394; *Jackson* d. *Griswold* v. *Bard*, 4 Johns. R. 230. In such cases the law never stops to inquire whether the grantee have notice or not of the matter offered against him, unless there be some registry law requiring it. It is not pretended that the registry law extends to a license. In the case at bar, the license was clearly proved by persons who were themselves parties to it. There was scarcely more room for mistake than if it had been under their hands and seals. Clearly, it bound the plaintiff as well as the Smiths. If his title has been embarrassed by the act of his grantors or any other person, he must resort to a remedy on his covenants of title. He cannot expect that the law should give any effect

whatever as against Granger, to acts between him and persons over whom Granger could have no control.

It is unnecessary to consider the other points in the cause made by the counsel for the plaintiff in error. They are of a minor character. The court below were, in the main, perfectly right; but we think they erred in allowing an adverse possession to be raised in behalf of the plaintiff below, unless the jury could say they disbelieved both the witnesses who swore to the license. Their want of credibility was not pretended. So far from that, all parties assumed that they spoke the truth.

The judgment of the court below is reversed; a *venire de novo* to issue there; the costs to abide the event.

HALSEY *v.* McCORMICK.

COURT OF APPEALS OF NEW YORK. 1855.

[*Reported* 13 *N. Y.* 296.]

APPEAL by the plaintiff from a judgment of the Supreme Court sitting in the Sixth District. The facts out of which the questions decided by this court arose, are sufficiently stated in the opinion. The case was submitted on printed briefs.

Ferris and *Cushing*, for the appellant.

W. V. Bruyn, for the respondent.

DENIO, J. The only question in this case is as to the location of the southerly boundary line of the plaintiff's lot. The conveyance, from the source of title under which the plaintiff claims the premises in controversy, describes the land conveyed, as follows: "A lot of land fronting the south side of the turnpike road running easterly by Bennett's mills, and joining the east line of lands belonging to the heirs of Richard W. Pelton, deceased, being five rods east and west in width, and running south from said road *to the bank of the six mile creek*." The defendant is in possession of a piece of land in the bed of the creek, or what was formerly the bed of the creek, and it is a part of this land which the plaintiff seeks to recover in this action. The plaintiff, on the trial, claimed that his deed conveyed the land to the centre of the creek, but the judge charged that the bank of the creek was the boundary, and the plaintiff excepted. There was a controversy as to where the bank of the creek was, and the judge charged "it was that line to which the water would flow when it was ordinary high water in spring and fall." To this the plaintiff excepted. There was evidence tending to show that the channel had changed since the deed above mentioned was executed, and upon that feature of the case the court charged, that if the creek had so receded imperceptibly by natural causes, then the plaintiff's land would follow the creek; but if it had been caused to

recede by artificial means, then the plaintiff's land would not follow it." The plaintiff excepted to this instruction. The defendant had a verdict, and the question before us is, whether these several instructions were correct.

(1) Did the deed carry the plaintiff to the centre of the creek, or only to the bank? This question is well settled against the plaintiff by several adjudged cases. The last of these is *Starr* v. *Child*, in the late Court of Errors (5 Denio, 599), and the others will be found referred to in the opinions of the judges in that case. The plaintiff's land is bounded by the bank of the creek, and does not extend any farther.

(2) I am of opinion that the deed carried the plaintiff to low instead of high water mark. It would be unreasonable to intend that by the description in that conveyance the parties contemplated that there should be a strip of land between the plaintiff's southern boundary and the water. If we adopt the ruling at the trial, the plaintiff, who may be presumed to have purchased with a view to such use of the stream as might ordinarily be had by the owner of land on one side of it, would be excluded from all use of the water except during the spring and fall months; and thus when he would be most likely to need it for the purpose of watering his cattle, or the like, he would be deprived of all benefit from its use. The judge was probably misled by what is laid down in the books respecting the shores of navigable waters, that is, of the sea and its arms, and rivers in which the tide ebbs and flows. In respect to this subject the rule is as it was laid down at the circuit. 3 Kent Com. 431, 432. This depends, however, upon a reason quite inapplicable to fresh water rivers. All the citizens of the State have a right to resort to the sea for the purposes of fishing, and the like, and therefore the space between high and low water mark is held to be the property of the public, like a common highway; and even a grant from the sovereign will not be construed to include this space unless it is clearly and indisputably so expressed. *Storer* v. *Freeman*, 6 Mass. 435; *Corbelyou* v. *Van Brundt*, 2 Johns. 357; *Kean* v. *Stelson*, 5 Pick. 492. Fresh water rivers, and especially small streams actually incapable of being navigated, are private to the same extent as other real estate. Should it be held that the soil between high and low water mark did not pass by a grant, in the terms made use of in this case, the public would still have no right to resort to the stream by means of this space, and the grantee, having no greater rights than any other individual, would be liable to be prosecuted for a trespass should he resort to the stream in low or ordinary water for the most necessary purpose. So far as I can find any authority on the question, it is in accordance with the views which I entertain. Chancellor Walworth, in *Child* v. *Starr*, 4 Hill, 373, said that a grant which was bounded by the shore of a fresh water river conveyed the land to the water's edge *at low water;* that the term "shore," when applied to such a river, meant the river's banks above low water mark, or rather those portions of the banks of the river which touch the margin or edge of the water of the

stream. In *Handley's Lessee* v. *Anthony*, 5 Wheat. 374, the same rule was applied to a grant by one of the States of the Union to another State. The contrary rule laid down on the trial of this cause would lead to such inconvenient, not to say absurd, consequences, that I feel quite satisfied that it ought not to be sustained; I am therefore in favor of reversing this judgment for the misdirection in this respect.

(3) The rule given to the jury in reference to the changing of the channel of the stream was as favorable, at least, as the plaintiff was entitled to. To hold that a change in the channel, by artificial means, would extend the boundaries of the plaintiff's lot, would be as unreasonable as to decide that the removal of the landmarks by which the boundaries of a man's farm were defined, would expand or contract its area. The plaintiff has no reason to complain of the ruling in this particular; but on account of the error just mentioned, he is entitled to another trial. Judgment reversed and new trial ordered.

Judgment accordingly.[1]

PAINE *v.* WOODS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[*Reported* 108 *Mass.* 160.]

COMPLAINT under the Mill Act, Gen. Sts. *c.* 149, for overflowing certain land of the complainant. At the trial by the sheriff's jury, the sheriff, among other rulings, made the following:[2] —

For the purposes of the trial, it was agreed that Broad's Pond, mentioned in the complaint as one boundary of the complainant's tract of land, was originally a natural pond, and had been, for sixty years and more before the date of the deed under which he claimed his title, and ever since, increased beyond its natural size by water flowed back by a permanent dam erected upon the stream forming its outlet; that for more than sixty years before 1868 it had every year been the usage of the owners of the dam to open sluiceways therein during the month of April or by the 1st of May, and keep them open until about the 1st of October, so that, while they were open, no water was flowed by the dam back upon said natural pond; that the dam described in the complaint was an ancient dam, and in 1868 was raised by the respondents from twelve to twenty-five inches in height, and has been kept at this full height ever since, and no sluice-ways have since been opened during the summer; that the respondents acquired title to the dam and the mill in 1868; and that the complainant acquired title to the land, for the overflowing of which he sought damages, by deed from Manson

[1] See *Dunlap* v. *Stetson*, 4 Mason, 349, 365, 366; *Murphy* v. *Copeland*, 38 Iowa, 409.

[2] Only part of the case is given.

Morse in October, 1853, afterwards conveyed the same to Samuel M. Colcord, and again acquired title thereto on February 28, 1860, by deed from Colcord, which deeds were introduced in evidence and described the granted premises as bounded "to" and "on" said pond.

The respondents contended that they were not liable for any damages to land claimed by the complainant, under said deeds, lying below the line of the pond as it was during that portion of the year when the ancient dam (before the change of its height in 1868) was kept at its full efficient height; and the complainant contended that they were liable for all damages by flowing occasioned by their dam to his land down to the line of the natural pond, meaning thereby the line of the pond as it was before 1868, during the months when the ancient dam was open so that no water was thereby flowed back upon the natural pond.

The respondents offered evidence tending to show the high water line of the pond at the efficient height of the ancient dam, as usually operated at the time when the complainant acquired his title (which high water line was in fact the highest line of the flowing occasioned by the dam during the winter and winters prior to 1868); and argued that the complainant, under his said deeds, acquired no title to any land below said high water line, and could recover no damages for injury to land below said line by flowing since 1868 from their dam, and that no testimony should be admitted as to damage or injury below said line; and requested the sheriff so to rule. The sheriff excluded the evidence, and declined so to rule; and ruled "that they were liable for damages occasioned by their dam, as erected in 1868, to all land of the complainant described in his petition, and that by his said deeds he took title to all lands on the pond, included within the other boundaries named in his deeds, down to the low water mark, or the line of the water of the pond during the summer, when not raised by the ancient dam."

The respondents excepted to the rulings of the sheriff, and the jury returned a verdict for the complainant, which was accepted by the Superior Court, and the respondents appealed.

G. C. Tuley, for the respondents.

C. I. Reed, for the complainant.

GRAY, J. . . . The next two rulings of the sheriff present interesting questions as to the rights of proprietors of lands on the borders of great natural ponds.

The English books afford little light upon this subject. Sir Francis Moore, who drew up the Statute of Charitable Uses of 43 Eliz. c. 4, says, in his reading thereon, that "common ponds or watering places are within the equity of" the words "ports and havens" in that Statute. Duke, ed. 1676, 5, 135; ed. 1805, 8, 129. But the question whether the title in the land under a great fresh-water pond or lake is in the proprietors of the lands adjoining, or in the Crown, does not seem to have been ever judicially determined in England. *Marshall*

v. *Ullswater Steam Navigation Co.*, 3 B. & S. 732. Hunt on Boundaries and Fences (2d ed.), 19.

But the law of Massachusetts, from a period reaching back almost to the first settlement of the colony, has treated great ponds as of a character nearly resembling tide-waters, the enjoyment of which for fishing and fowling and other uses was common to all, and the title in which and the lands under them was not the subject of private property, unless by special grant from the legislature. Body of Liberties of 1641, art. 16; Ordinance of 1647; Anc. Chart. 148, 149; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Commonwealth* v. *Vincent*, 108 Mass. 441.

The general rule of construction of all grants of land bounded by water of any kind is now well established, that unless qualified by restrictive words, they pass the soil towards the centre of the water, as far as the grantor owns. For example, where, as in this Commonwealth, the shore of the sea between high and low water mark is private property, it is included in a grant of land bounded "by the sea," or "harbor," or "bay," or other word descriptive of tide-water. *Boston* v. *Richardson*, 105 Mass. 351, 355, and cases cited. So a grant of land, bounded by a river or stream above the ebb and flow of the tide, carries the grantor's title to the thread of the stream. *Boston* v. *Richardson*, 13 Allen, 146, 154, and 105 Mass. 351, 355, and cases cited. And this, even if at the time of the grant the water of the stream has been permanently raised by artificial means so as to create a pond, and the grant is bounded generally by that pond. *Phinney* v. *Watts*, 9 Gray, 269, and cases cited; *Hathorn* v. *Stinson*, 1 Fairf. 224, 238, and 3 Fairf. 183. In like manner, a grant bounded by a great pond or lake which is public property extends to low water mark. Walworth, C., in *Canal Commissioners* v. *People*, 5 Wend. 423, 447; Shaw, C. J., in *Waterman* v. *Johnson*, 13 Pick. 261, 265; Hoar, J., in *West Roxbury* v. *Stoddard*, 7 Allen, 158, 167; *Wood* v. *Kelley*, 30 Maine, 47, 55; *Fletcher* v. *Phelps*, 28 Verm. 257.

The cases cited for the respondents, when carefully examined, will not justify taking the case at bar out of the application of the rules just stated.

Waterman v. *Johnson*, 13 Pick. 261, was the case of a complaint under the Mill Act for flowing land described in the deed under which the complainant claimed title as bounded by "Jones River Pond," a large natural pond, which before the date of the deed had at times been raised to a certain line by means of a dam of permanent materials, adapted in its ordinary use to raise the water to that line. The judge at the trial ruled that high water mark of the pond as thus extended would *prima facie* be considered as the boundary of the complainant's land; but admitted parol evidence to show, and the jury found, that at the time of the conveyance a certain natural bank or barrier, which was not thus overflowed, and which the natural pond had never overflowed, was intended and agreed upon by the parties as the marginal

line of the pond referred to in the deed. The full court, in the judgment delivered by Chief Justice Shaw, after stating the general rules of law, that, when the description of a boundary in a deed had a definite legal meaning, parol evidence was inadmissible to control it; that, by legal operation, a boundary by the sea or salt water gave a title in the soil to low water mark; a boundary upon a river not navigable, to the thread of the stream; upon a large natural pond, having a definite low water line, to that line; and upon an artificial pond raised by a dam swelling a stream over its banks, to the thread of the stream, unless the pond had been so long kept up as to have become permanent and to have acquired another well-defined boundary; expressed an opinion that under the peculiar circumstances of the case the parol evidence was rightly admitted; and held that there was no ground in point of law, or upon the evidence in the case, upon which the respondents could claim that the grant did not extend, in the direction of the pond, as far as the barrier.

Upon that case, it is to be observed, 1st. The ruling at the trial, that the boundary was *prima facie* to be considered as the high water mark of the pond as artificially raised, was inconsistent with the opinion of the full court; 2d. The only point necessarily involved in the decision was that the grant was not extended too far by carrying its effect to the natural barrier; 3d. That decision was equally sustained, whether the parol evidence was admitted, or the terms of the grant by their own force extended so far; 4th. The admission of the parol evidence was based upon the theory that the boundary on the pond, as applied to the subject-matter, was governed by no settled rule of legal construction, but created a latent ambiguity; and the rules for the construction of similar grants were not then as fully established in this Commonwealth as they have since been by the later decisions already referred to. For instance, in *Tyler* v. *Hammond*, 11 Pick. 193, in the previous year, the court had held that a boundary by a highway generally extended only to the margin of the way, — a doctrine wholly repudiated by the modern decisions. *Newhall* v. *Ireson*, 8 Cush. 595; *Phillips* v. *Bowers*, 7 Gray, 21; *Boston* v. *Richardson*, 13 Allen, 146; *Stark* v. *Coffin*, 105 Mass. 328.

The other cases in this court, cited for the respondents, were not of grants of land bounded by a pond, but of the extent of the right of flowing obtained by grant or prescription. *Morse* v. *Marshall*, 11 Allen, 229, and 13 Allen, 288; *Cowell* v. *Thayer*, 5 Met. 253; *Ray* v. *Fletcher*, 12 Cush. 200; *Jackson* v. *Harrington*, 2 Allen, 242.

In *Bradley* v. *Rice*, 13 Maine, 198, the Supreme Court of Maine indeed held that where a natural pond had been raised by artificial flowing so as to become a mill-pond, permanently extended beyond its natural limits, a grant of land bounded by the pond should be limited to the artificial margin of the pond in its present condition. But the same court, after fully considering that decision, has since held, that in such a case, when the margin varied at different seasons of the year, a

grant bounded by the pond included all the land that was uncovered when the water was at the lowest. *Wood* v. *Kelley*, 30 Maine, 47.

In the present case, it appeared that the land in question was flowed, and the pond raised to an artificial height, in winter only, and that in summer the pond was allowed to remain at its natural level. Applying to this case the rules already stated, the conclusion is that the deeds, under which the complainant claims title, bounding him "to" and "on the pond," extended to low water mark of the pond in its natural state; and that the fact that the deeds were made during the season when the pond was temporarily raised by the dam cannot affect the extent of their operation. The fourth ruling of the sheriff was therefore correct. The burden was of course on the complainant to prove that the premises for the flowing of which he claimed damages were above low water mark, and it does not appear that the jury were instructed otherwise.

SLEEPER *v.* LACONIA.

SUPREME COURT OF NEW HAMPSHIRE. 1880.

[*Reported* 60 *N. H.* 201.]

APPEAL, from the award of damages by the selectmen, for land taken for a highway. Facts found by referees, who awarded that the plaintiff should recover $400 if the title of the plaintiff extended to the centre of the Winnipiseogee River. He derived his title through one Reeves from Baldwin, who was bounded by the river. The description of the land, as given in the deed from Baldwin to Reeves, and in the deed from Reeves to the plaintiff, so far as material to determine the question raised, is as follows: "thence north-westerly on the line of Baldwin's land to the river, thence north-easterly on the river shore to Church Street." When the plaintiff purchased his lot, there was between the high ground on his lot and the main channel of the river a low piece of ground covered with water. It was over this low ground that the highway was partly laid.

The referee rejected evidence offered by the defendants to show that at the time Baldwin conveyed to Reeves it was verbally agreed between him and Baldwin that the shore of the river should be the boundary of the lot; and the defendants excepted.

Hibbard and *Whipple*, for the plaintiff.

Jewell and *Stone*, for the defendants.

STANLEY, J. Baldwin once owned the premises in question. His line extended to the river, "thence on the river," &c. This gave him the soil to the thread of the stream. *State* v. *Gilmanton*, 9 N. H. 461; *Greenleaf* v. *Kilton*, 11 N. H. 530; *State* v. *Boscawen*, 28 N. H. 217; *Nichols* v. *Suncook Mfg. Co.*, 34 N. H. 345, 349; *Kimball* v. *Schoff*, 40 N. H. 190; *Bradford* v. *Cressey*, 45 Me. 9. Running the line to the

river does not restrict the grant to bank or shore of the river. The river is the monument, and, like a tree, a stake, a stone, or any other monument, controls the distance, and is to be considered as located equally on the land granted and the land of the adjoining owner. The centre of the monument is the boundary, and the grant extends to that point.

These views are not controverted, but the defendants contend that the clause in the deed from Baldwin to Reeves and from Reeves to the plaintiff, "thence north-easterly on the river shore," limits and restricts the grant to the bank or shore of the river. In *Woodman* v. *Spencer*, 54 N. H. 507, this question was considered in respect to land bounded by a highway, and it was there held that the expressions "on the highway," and "by the side of the highway," were identical in meaning and effect; and this view is fully sustained by *Dovaston* v. *Paine*, 2 Sm. L. C., H. & W., notes 213, 217, 232, 234, 235, 237, 238; *Motley* v. *Sargent*, 119 Mass. 231; *Peck* v. *Denniston*, 121 Mass. 17; *O'Connell* v. *Bryant*, 121 Mass. 557. The rule is a presumed understanding of the parties that the grantor does not retain a narrow strip of land under a stream or other highway, because the title of it left in him would generally be of little use, except for a purpose of annoyance and litigation.

The evidence as to the agreement between Baldwin and Reeves tended to contradict the deed, and was properly excluded. *Goodeno* v. *Hutchinson*, 54 N. H. 159.

Judgment on the report for the plaintiff for $400.

Foster, J., did not sit; the others concurred.[1]

C. *On Ways.*

BERRIDGE *v.* WARD.

Common Pleas. 1861.

[*Reported* 10 *C. B. N. S.* 400.]

The first count of the declaration alleged a trespass on certain land of the plaintiffs. To this the defendant pleaded Not guilty; that the land was not the plaintiffs'; and *liberum tenementum*. Issue

[1] The rules are the same as to an artificial as on a natural stream. *Warner* v. *Southworth*, 6 Conn. 471 (1827); *Agawam Canal Co.* v. *Edwards*, 36 Conn. 476 (1870).

The ordinary rule that land on a river is bounded by the middle of the stream is not affected by the fact that the land consists of town lots. *Arnold* v. *Elwers*, 16 Wis. 509 (1863). *Wilcox* v. *Perry*, 26 Mich. 508 (1873).

Cf. *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133 (1886); *Norcross* v. *Griffiths*, 65 Wis. 599 (1886). On bounding "by the shore" in Massachusetts and Maine, where private ownership extends to low water, see 9 Gray, 524 *note*, also *Litchfield* v. *Ashcroft*, 136 Mass. 39, 45.

thereon. The other counts were for obstruction of private ways and a highway.

The cause was tried before *Cockburn*, C. J., at the last Summer Assizes for the County of Kent.

It appeared, that, in 1852, the plaintiffs purchased at a public auction certain land in the parish of Minster, in the Isle of Sheppy, part of a large portion of marsh land formerly the property of the late Sir Edward Banks. In the conveyance the land so purchased was described as "all those pieces or parcels of freehold land situate, lying, and being in the parish of Minster, in the Isle of Sheppy, in the County of Kent, near to the town of Sheerness, commonly called or known by the names, and containing the quantities mentioned and set forth in the schedule hereunder written, and the situations, boundaries, and numbers whereof are set forth in the plan thereof drawn on the skin of parchment annexed to these presents," &c.; and "all the pieces of land and hereditaments hereby conveyed, or intended so to be, being on the said plan colored red, together with all outhouses, edifices, buildings, hedges, ditches, fences, roadways, paths, passages, watercourses, timber and other trees, easements, commons, profits, privileges, commodities, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever to the said pieces or parcels of land, gas-works, hereditaments, and premises, or any part thereof, belonging or appertaining."

The quantity of land sold to the plaintiffs was 11*a.* 9*p.*: and the pieces colored red on the plan contained that quantity, exclusive of the road.

The defendant in 1856 became the purchaser of another portion of the same property, and claimed to be entitled to the spot in question as part of his purchase.

It was also proved that the actual measurement of the land purchased by the plaintiffs, including the fence, but excluding the adjoining road, was 11¼ acres; the measurement inserted in the schedule to the conveyance being 11*a.* 5*p.*

The question on the first count was reserved. The jury found for the plaintiffs on the other counts.

Montague Chambers, Q. C., obtained a rule *nisi* to enter a verdict for the defendant on the second and third pleas to the first count, "on the ground that the evidence did not prove that the land on which the trespass was committed was the plaintiffs' soil and freehold, and disprove that it was the defendant's soil and freehold," or for a new trial for misdirection of the judge to the jury as to the other counts.[1]

Bovill, Q. C., *Lush*, Q. C., and *Denman*, showed cause.

Montague Chambers, Q. C., and *Hannen*, in support of the rule.

Erle, C. J. I am of opinion that this rule should be discharged. As to the first branch of it, which seeks to enter a verdict for the

[1] The statement of the case is condensed by omitting the part relating to the other counts; so much of the opinion as relates to them is also omitted.

defendant on the second and third pleas, on the ground that the evidence failed to prove that the land on which the trespass was committed was the plaintiffs' soil and freehold. I think the counsel for the defendant have failed to sustain that point, because I am of opinion, that, where a close is conveyed with a description by measurement and color on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance. The cases cited on the part of the plaintiffs establish that.

Williams, J. I am of the same opinion; and I will only add a word as to the point of law arising on the first count of the declaration. In the case of *The Marquis of Salisbury* v. *The Great Northern Railway Company* [5 C. B. N. S. 174], which has been referred to, there was enough on the face of the conveyance which was set out in the special case to show that a moiety of the adjoining highway was not intended to pass. That case, therefore, is out of the general rule, which I take to be this, — that a conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land. There is nothing in the present case to take it out of that general rule.

Willes, J., and Keating, J., concurred.

Rule discharged.[1]

LEIGH *v.* JACK.

Court of Appeal. 1879.

[*Reported* 5 *Ex. Div.* 264.]

Special case stated by an arbitrator in an action of ejectment pursuant to a judge's order.

The land sought to be recovered was situate in the township of Kirkdale, and within the borough of Liverpool. One part of it was the soil of an intended street, called Grundy Street, running from east to

[1] But see *Sutherland* v. *Jackson*, 32 Me. 80; *Hanna* v. *Campbell*, 20 Md. 224. Cf. *Gould* v. *Eastern R. R. Co.*, 142 Mass. 85. "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant, but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as denoting a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the thing so running over or standing on the land is the boundary of the lot granted." Per Gray, C. J., in *Boston* v. *Richardson*, 13 Allen, 146, 154, 155.

west, and leading on the east into Victoria Road, and on the west into Regent Road. It was bounded upon the north by land conveyed to the Mersey Dock Trustees in 1857, as hereinafter mentioned: it was bounded upon the south at the eastern end by Napier Place, and along the rest of the line of the street by land conveyed to the defendant in 1854, as hereinafter mentioned. The other part was Napier Place, a triangular piece of land having its apex towards the south, and at its base immediately adjoining the east end of the south side of Grundy Street. Napier Place was bounded upon the east by Victoria Road, and upon the west by the piece of land conveyed to the defendant in 1854. The plaintiff was tenant for life of all the lands of which J. S. Leigh had died seised.

In 1854, J. S. Leigh being seised in fee of a piece of land lying to the south of Grundy Street and to the west of Napier Place, conveyed it to the defendant in fee, subject to a ground rent. The piece of land conveyed was thus described in the deed: "All that piece of land situate, lying, and being in the township of Kirkdale, within the borough of Liverpool, in the County of Lancaster, and on the east side of Regent Road, south side of Grundy Street, and west side of Napier Place in Victoria Road in Liverpool aforesaid, bounded on the north by Grundy Street, on the east by Napier Place, on the south in part by land formerly of the said J. S. Leigh, but now belonging to the Lancashire & Yorkshire Railway Company, and in the remaining part by land lately conveyed by the said J. S. Leigh to the said J. Jack on which the said J. Jack hath erected an iron foundry and other buildings, and on the west by Regent Road aforesaid, and which said piece of land intended to be hereby granted measures in front to Regent Road aforesaid 145 ft., to Grundy Street 252 ft. 6 in., to Napier Place 137 ft. 5 in., and on the south side thereof 297 ft. 10 in., and containing in the whole 4259 square yards of land or thereabouts, being the said several dimensions and quantity a little more and less." The 4,259 square yards were the total contents of the land south of Grundy Street, and did not include any portion of the site of that street. On the 19th of March, 1857, the said J. S. Leigh, by deed of that date, conveyed to the Mersey Dock Trustees the piece of land lying to the north of Grundy Street. The material parts of the deed were as follows: "The said J. S. Leigh doth by these presents grant and confirm unto the said trustees of the Liverpool Docks, their successors and assigns, *inter alia*, all that piece or parcel of land situate in the township of Kirkdale aforesaid, bounded on or towards the south by a public road or street called Grundy Street, . . . together with the free use and enjoyment of all the said streets, roads, and passages, for all purposes in common with all other persons lawfully entitled to use the same." The total contents did not include any portion of the site of Grundy Street. On the 30th of March, 1872, the last-mentioned piece of land was by deed conveyed by the Mersey Dock Trustees to the defendant.

Grundy Street and Napier Place were names used to describe certain portions of waste land belonging to J. S. Leigh, and which he had at one time contemplated dedicating to the public as streets, and they were marked as streets on a plan of that portion of the Leigh estates, which he caused to be prepared and hung up in the Leigh Estate Office with a view to the sale or lease of portions of the estate for building. Grundy Street and Napier Place were never in fact used by the public as highways. Save as before stated, J. S. Leigh never dedicated Grundy Street or Napier Place to the public. [There was evidence as to the occupation by the defendant of Grundy Street and Napier Place.]

It was contended on behalf of the plaintiff that she was entitled as against the defendant to the possession of the piece of land in respect of which the action was brought. It was contended on behalf of the defendant, first, that he had acquired a title to the land by possession of more than twenty years next before suit:[1] secondly, that by virtue of the deeds, coupled with the facts above stated, all Grundy Street and the western portion of Napier Place, *usque ad medium filum viæ*, had been vested in him. If and so far as it was a question of fact, the arbitrator found as a fact that the defendant had not acquired a title by possession and user only to any portion of the land sought to be recovered.

The question for the opinion of the court was, whether the plaintiff was entitled to eject the defendant from the possession of the land sought to be recovered, or any part of it.

The Exchequer Division (*Kelly*, C. B., and *Cleasby*, B.) gave judgment for the plaintiff.

The defendant appealed.

C. Russell, Q. C., and *W. H. Butler*, for the defendant.

Herschell, Q. C. (*Gully*, Q. C., with him), for the plaintiff.

Cockburn, C. J. As to both the questions argued before us, we think that the contention on behalf of the defendant cannot be sustained.

I will first deal with the question whether the defendant as adjoining owner must be presumed to be seised of the soil of Grundy Street and Napier Place. It is to be recollected that we have to construe conveyances of land situated within a town, and to be used in all probability for building purposes, and lying upon each side of an intended street. I think that the legal presumption as to the ownership of the soil of a highway does not apply to intended streets. That presumption is founded upon a reasonable probability as to the intention of the adjoining owners, and it lays down a principle which has a very convenient operation. It is presumed that those who were seised of the neighboring land devoted the surface of their soil to the public, in

[1] The facts as to the possession by the defendant are omitted, as are also those parts of the judgment which refer to the defence of the Statute of Limitations, which did not prevail.

order to confer a common benefit on all those desirous of using the highway, without, however, parting with the ownership of the soil itself. This doctrine applies where the evidence as to the ownership of the soil of the highway has been lost either by lapse of time or from other causes; but in the present case the boundaries of the property conveyed are known, and its extent can be ascertained, and under these circumstances it cannot be assumed that the grantor meant to divest himself of the soil of the road, or that the conveyances were intended to have an operation more extensive than that which their language imported. The presumption relied upon does not apply in the case of a recent grant or conveyance.

BRAMWELL, L. J. I also am of opinion that the plaintiff is entitled to succeed.

The first question is, what passed by the conveyances executed by J. S. Leigh. In order to ascertain that, we must look at the surrounding circumstances existing when the pieces of land were granted. If a man sells all his land at Dale, and if the land is bounded by public roads, the soil of the roads passes *usque ad medium filum viæ*; in like manner if he sells his field at Dale, the soil of the adjoining roads will pass to the grantee; and if by the terms of his grant he states the boundary of his field in popular language, the result will be the same: for it can be properly contended that the vendor did not convey less than if he had in his grant simply used the word "field." That appears to be the principle which applies to an ordinary conveyance: but how can it apply to the facts before us? At the time when these conveyances were executed, no street existed in fact: before the pieces of land were conveyed, J. S. Leigh might have made the intended street either wider or narrower as he deemed to be more advisable for his remaining property, and upon this state of facts a cogent argument arises against the contention for the defendant, namely, that if J. S. Leigh, after the execution of the conveyances, had wished to make the street according to the original scheme, he might have debarred himself from so doing; for his grantees might have interfered to prevent any disturbance of the soil which had passed to them. I think that the case is clear as to the piece of land granted in 1854 and lying upon the south side of Grundy Street; but I own that I have had a misgiving whether the case is equally plain as to the piece of land lying upon the north side. I think, however, that when the surrounding facts are looked at, it becomes manifest that it was not intended to grant the soil of Grundy Street and of Napier Place. The piece of land conveyed by J. S. Leigh in 1857, was described in the deed as "bounded on or towards the south by a public road or street called Grundy Street:" these words may be thus paraphrased, "bounded on or towards the south by a piece of land, which I, the grantor, intend to dedicate to the public, and to call Grundy Street." If the words be read in this sense, it plainly appears that even by the conveyance made in 1857 the soil of Grundy Street *ad medium filum viæ* did not pass to the grantees.

Cotton, L. J. The first question depends upon the construction of the conveyances mentioned in the special case. Neither of them conveys the soil of the street in express terms, but the defendant relies upon a presumption of law by which, he alleges, the soil is vested in him. This presumption is well known: it is assumed, in the absence of express evidence, that the adjoining owners have contributed to the formation of the road, and have dedicated it for the public benefit: it is reasonable, therefore, that when a man grants all his land or all his fields, he should be held to grant also the soil of such roads as may form the boundary of his property, *usque ad medium filum viæ*. But this doctrine depends upon a presumption which may be rebutted: it applies to existing roads: but no case has been cited where it has been held to extend to a conveyance of land adjoining a piece of land intended to be dedicated as a highway. I think that in such a case as that the grantor remains owner of the soil of the intended road. It may be necessary to do much before the dedication can be effected: and if the grantor parts with the soil of the intended road, it may become impracticable to carry out this intention, unless, indeed, the indenture contains a covenant by the purchaser to dedicate the road, which after all affords but an imperfect remedy. It is right to allude to the language of the conveyance executed in 1857: it is not identical with the language of the conveyance executed in 1854, but the difference is not so great as to require us to put a different construction upon it. When the piece of land was granted in 1854, one half of the site of the intended road must have been retained by J. S. Leigh, even according to the view put forward on behalf of the defendant: this circumstance alone renders it doubtful whether the presumption can be applied. It is to be further recollected that although the sites of Grundy Street and Napier Terrace had been marked out, yet no right of way existed over them. I decide this case for the reasons which I have already mentioned, but I wish to remark that I think it very questionable whether the presumption can ever be held to extend to those cases, where land is sold in plots for building purposes, even although the roads have been actually laid out.

SIBLEY *v.* HOLDEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1830.

[*Reported* 14 *Pick.* 242.]

TRESPASS *quare clausum fregit*.

It was agreed that the plaintiff and the defendant were once tenants in common of a farm in Barre. The conveyances to the parties included an ancient town road, two rods wide, laid out through the farm. On the 15th of February, 1826, the parties made a partition by mutual

deeds of release and quitclaim. The description of a tract released by the defendant to the plaintiff was as follows: "Beginning at a stake and stones on the southerly side of a town road," &c. thence by various courses "to said road; thence by said road easterly to the place of beginning." The plaintiff released to the defendant two tracts by the same form of description. On the day when the supposed trespass was committed, the defendant went upon the southerly part of the road opposite to the plaintiff's fence on the road, the distance of four feet from the fence, and dug and carried away earth and gravel, and converted the same to his own use.

If upon these facts the court should be of opinion that the plaintiff could maintain his action, he was to recover such damages as the court should order, and costs; otherwise the defendant was to recover costs.

The cause was argued in writing by *Merrick*, for the plaintiff, and *J. Davis* and *Lee*, for the defendant.

Per Curiam. This is a mere question of construction of the respective deeds of the parties, by which partition was made *in pais*, each releasing to the other their respective rights in the parts described in their respective deeds.

It is conceded in the argument, that if by the operation of these deeds the soil in the highway was not divided and they are still tenants in common of that soil, this action of trespass cannot be maintained. It is also conceded, that it was competent for the parties to make partition of the lands adjoining the highway, and remain tenants in common of that soil, or to include the soil of the highway in their partition, subject to the public easement, at their pleasure. It therefore remains as a question of construction upon their deeds, whether the partition did or did not include the soil of the highway. The deeds being executed at the same time, and for the manifest purpose of enabling each to hold in severalty, what they before that time held in common, it is reasonable to consider them as parts of one transaction, and to construe them together. From these deeds it appears that the parties respectively released and quitclaimed to each other, tracts of land to hold in severalty, the one upon the southerly and the other upon the northerly side of the way in question.

By these deeds, two tracts are released to one party, and one tract to the other. The description of each tract begins at a stake and stones, on the side of the town road, thence runs various courses, thence to said road, and thence by said road to the place of beginning.

From this description, we are all of opinion, that the line must begin on the side of the road, and at that point exclude the road: then the question is, whether when the description returns *to the* road again, it shall be taken to mean the side or the centre of the road. If construed to be the centre, then the remaining line would neither be by the side of the road nor the centre, but by a diagonal line from a point in the centre to a point in the side. This would not only be obscure and

inconsistent with any supposed intent of the parties, but repugnant to the last clause in the description, which is, "*by* said road to the place of beginning." As one point in this line is fixed by the description to the side of the road, we are satisfied that by a just and necessary construction, the other point must be taken to be at the side of the road, and therefore that the soil of the road was not included.

The strongest argument opposed to this construction is, that the parties intended to make partition of their entire interest. Without weighing the force of this argument if well founded, we can perceive no evidence of any such intention. There is no recital to that effect, and nothing to show that the parties did not continue to be tenants in common of other parts of the farm. Each releases to the other, his right in specific portions of the land, very particularly described. No inference can be drawn that their purpose was to divide the whole of their common property.

It is further insisted, that there could be no motive to leave the soil in the highway undivided. Without insisting upon the small value of the soil of a highway over which the public has a perpetual easement, or the popular belief, that the public are the owners of the soil of a highway, it may well be suggested, that they looked to the possibility of the discontinuance of the road as a public highway, in which case both would have an interest to secure a common right of way to their respective estates. But without particularly inquiring into motives, which could have no weight except in a doubtful case, we are satisfied, that the deeds in severalty did not embrace the soil of the highway, that of this the parties still remained tenants in common, and therefore, that this action cannot be maintained.

Plaintiff nonsuit.[1]

CHAMPLIN *v.* PENDLETON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1838.

[*Reported* 12 *Conn.* 23.]

THIS was an action of ejectment; tried at New London, September Term, 1837, before *White*, J.

The plaintiff claimed title to the demanded premises, by virtue of a deed from John Denison to him, dated April 26th, 1811, and two deeds from John Denison 2nd to John Denison, jun., one dated February 26th, 1793, and the other, October 14th, 1802; a deed from Elihu Cheesborough to Edward Denison, dated August 7th, 1753; the distribution of Edward Denison's estate, made in September, 1758; and the original survey and laying-out of a highway in Stonington, accepted in February, 1753.

[1] *Courtis, Law* v. *Tibbets*, 72 Me. 92. See *Peck* v. *Denniston*, 121 Mass. 17; *Peabody Heights Co.* v. *Soutter*, 63 Md. 533.

The highway was thus described in the survey: "Beginning at the southerly end of a large rock, marked with the letter H, near the salt water, on the east side of Stonington harbor, on a point of land belonging to Elihu Cheesborough; then east, sixteen rods, to a heap of stones; thence north, twenty-four degrees east, eight rods; thence west, four rods, to a heap of stones; and still west, holding the breadth of eight rods, into the salt water, at the harbor aforesaid."

The deed from Elihu Cheesborough to Edward Denison described the premises thereby conveyed, thus: "Beginning at a mere-stone marked E D, and from thence running west, bounded southerly by the highway or landing, laid out by a jury, on the east side of Stonington harbor, and so running into the salt water; also from the aforesaid bound marked E D, running north, sixteen degrees east, thirteen rods and eighteen links, easterly by the highway, to a mere-stone; thence north, seven degrees east, three rods and eighteen links, by said highway to a mere-stone marked L; from thence running west into the salt water; thence to, and with, and by salt water, until an east course will bring you to the first-mentioned bound marked E D."

In the distribution of Edward Denison's estate there was "set off to John Denison out of that parcel of land that lieth on the east side of Stonington harbor, that the said Edward Denison, deceased, bought of Elihu Cheesborough, as followeth: "beginning at a mere-stone that stands on the west side of a highway that is laid out on the east side of Stonington harbor; said mere-stone stands south-east three feet from the south-east corner of said Edward Denison's dwelling-house; from thence west till it comes to the salt water; thence back again to said mere-stone; from thence northerly, by said highway, four rods and three links, to a mere-stone; from thence west till it comes to the salt water."

The deed from John Denison 2nd to John Denison, jun., of the 26th February, 1793, was a release of all the grantor's "estate, right, title and interest in the one undivided half of his wharf lying at Long Point in Stonington."

The deed from the same grantor to the same grantee conveyed the other undivided half of the same premises, with covenants of warranty, &c.

In the deed from John Denison to the plaintiff the premises were thus described: "One certain lot of land lying on Stonington Point, with two stores and a wharf thereon and adjoining: beginning at a mere-stone that stands on the north side of the landing at Stonington Point; from thence west, three rods, to the salt water; from thence north to the wharf belonging to Col. Isaac Williams; from thence east, eight rods, to the street; from thence north to the first-mentioned bound; with all the privileges and appurtenances thereunto belonging."

The plaintiff claimed to have proved, that the land conveyed, by said deeds, lay north of the highway and adjoining thereto; the south line

of the premises being the north line of the highway; that such highway was a public highway, seven rods, thirty-one one hundredths wide, laid out, by order of the county court, in the year 1753, and used as such until the year 1829; that in the year 1829, it was discontinued, by the county court, except twenty feet in width on the north and south side; that since such discontinuance, that part thereof, including the demanded premises, over which the highway was discontinued, had been in the possession of the defendant; and that the demanded premises were the northerly half of the discontinued part of the highway, and were bounded on the north, by that strip of the highway on the north side thereof, which was not discontinued.

The defendant claimed, that as the deeds under which the plaintiff and his grantor claimed title, did not bound the land *upon*, *by* or *along* the highway, or running *to* the highway, nor in any way mention or refer to the highway as a boundary of the land, no portion of such ancient highway, or the land over which it was laid, was conveyed, by the deeds, or either of them; and prayed the court to instruct the jury accordingly.

The court charged the jury, that if they should find, that the grantors, by such deeds, conveyed the land to the line of the highway, and did in fact bound it upon the highway, though the deeds did not contain any words bounding it *upon*, *by* or *along* the highway, or in any way mention or refer to the highway as the boundary of the lot; still the legal construction of the deeds was the same as if they contained such words, and conveyed the land to the centre of the highway.

The jury returned a verdict for the plaintiff; and the defendant moved for a new trial for a misdirection.

Isham and *Cleaveland*, jun., in support of the motion.

Strong, contra.

WAITE, J. In the very late case of *Chatham* v. *Brainard*, 11 Conn. Rep. 60, we had occasion to examine the law in relation to the ownership of highways. The different authorities upon this subject are so fully examined and considered, in the opinion given in that case, that it is unnecessary again to refer to them. We there held, that the ownership of the lands on each side of the way, furnishes *prima facie* evidence that such owner has a fee in the highway, and that strong testimony is necessary to rebut it. Whatever may have been the conflicting opinions heretofore entertained upon this subject, that rule, which is founded principally upon policy, may now be considered as fully settled, at least, in this State. And although land adjoining a highway may be so conveyed as to exclude the way; yet the inference of law is, that a conveyance of land, bounded on a highway, carries with it the fee to the centre of the road as part and parcel of the grant. An intention on the part of the grantor to withhold his interest in the road, after parting with all his interest in the land adjoining, is never presumed. It ought to appear in clear and explicit terms, so that the grantee may understand that the grantor's interest in the road is not

conveyed. Judge Swift, in the case of *Stiles* v. *Curtis*, 1 Day, 338, says: "If it had not been universally understood that the conveyance of land adjoining a highway conveyed the right of soil in it, express words for that purpose would, long since, have been inserted in deeds."

Was the charge of the court to the jury in this case in conformity with these principles? Under it, the jury must have found, that the plaintiff by virtue of the several deeds referred to in the motion, was the owner of the land adjoining the highway. The presumption of law, then, is, that he owns to the centre of the highway. Is there anything in any one of those conveyances to rebut that presumption? We discover nothing of the kind. There is no expression to be found, indicating an intention on the part of any one of the grantors to exclude the highway.

The deed from John Denison to the plaintiff has been principally relied upon, by the counsel for the defendant, as supporting their claim. The boundaries of the tract of land there conveyed are given, and the description of the south line corresponds with the north line of the highway, as originally laid out. There is a clear intention to convey all the land north of the highway, with all the privileges and appurtenances, and nothing to show a design to exclude the road.

But it is said, there is a difference between a deed describing the land as bounded *upon*, *by*, or *along* the highway and one in which no mention is made of the road; and that in the former case, the fee of the highway will pass, but not in the latter. But we know of no such distinction. If the land conveyed is in fact bounded by a highway, it can make no difference in the legal construction of the conveyance whether the words "by the highway" are used or not. The effect in the one case, will be the same as in the other.

We are satisfied, therefore, that the instruction given to the jury was right; and that no new trial should be granted.

In this opinion the other judges concurred.

New trial not to be granted.[1]

BUCK *v.* SQUIERS.

SUPREME COURT OF VERMONT. 1850.

[*Reported* 22 *Vt.* 484.]

EJECTMENT for land in Chelsea. The suit was brought in the name of the heirs of D. Azro A. Buck, as plaintiffs, for the benefit of Sereno Allen, to whom the plaintiffs conveyed the demanded premises by deeds dated September 7, 1847, and November 11, 1847, the defendant being

[1] But see *Hoboken Land Co.* v. *Kerrigan*, 31 N. J. L. 13 (1864).

in possession of the premises at the time, claiming adversely to the plaintiffs. Plea, the general issue, and trial by jury, December Term, 1848, — *Redfield*, J., presiding.

The plaintiffs proved, that the land in dispute had formerly, for more than fifteen years, been in the possession of the plaintiffs' ancestor, he claiming to hold the land in his own right, and that the plaintiffs were his heirs, and that the defendant was in possession of the premises at the date of the service of the plaintiffs' writ. The plaintiffs, in proving their title as heirs of D. Azro A. Buck, proved, that he died, in the year 1840, in the city of Washington, and that the plaintiffs were his sole surviving heirs, and that there had never been any administration upon his estate in this State. It was admitted, that there had been no division or distribution of the estate among the heirs, by the Probate Court. The defendant insisted, that the plaintiffs could not maintain this action, without showing such division and distribution; but the court overruled the objection.

The defendant gave in evidence a deed from D. Azro A. Buck to Daniel Wyman, dated September 10, 1813, describing a piece of land in Chelsea by the name of the "hop yard," and also by metes and bounds, as follows, — "beginning at the intersection of the road from Chelsea to Allen's saw mill and the branch on which the saw mill stands on the northerly side of said branch and nearly opposite my now dwelling house; thence on the easterly side of said road until the said road strikes the bank of said branch; thence down said branch, in the middle of the channel, to the first-mentioned bounds." The defendant also gave in evidence deeds of the same land, through many intermediate persons, to himself, and proved, that, as the road and the branch now run, all the land in dispute was conveyed by the deeds to the defendant. The defendant also gave evidence tending to prove, that the premises called the "hop yard," from a time soon after the conveyance to Wyman until the commencement of this suit, had been enclosed and occupied by the several persons to whom they had been conveyed; but that the point of land in dispute, lying in the angle of intersection between the road and the branch, at the southerly point of the same, had been for many years low and marshy and mostly unfit for use, but had been used, when sufficiently dry for that purpose, by the proprietors of the adjoining portion of the "hop yard," for the purpose of piling wood, and for other convenient uses, from time to time, until it became more dry, when the defendant erected a shop thereon; that formerly the road was travelled nearer the land in dispute, but that lately, in consequence of the bridge being placed lower down the stream, the travel had inclined more to the westerly side of the road, — but that the fence upon the west side of the road had remained where it now is for more than thirty years, and probably for more than forty years; and that during all the time after the conveyance by D. Azro A. Buck to Wyman, until the commencement of this suit, the defendant and those under whom he claims had claimed the land in dispute, as a portion of the land included

in the deed to Wyman, and that, to the time of the deed from the plaintiffs to Allen, neither the plaintiffs, nor D. Azro A. Buck, had ever made any claim to the land in dispute.

The plaintiffs, for the purpose of rebutting the evidence of the defendant, offered to prove, that the land in dispute, at the time of the deed from D. Azro A. Buck to Wyman, was between the middle of the road and the middle of the stream, and that, in consequence of the stream cutting a deeper channel and the road being laid farther west in 1836, this land became suitable and convenient for use, without interfering with the road or the stream.

It was admitted, that on the tenth of September, 1813, D. Azro A. Buck owned the land on both sides of the road, and that before his death he conveyed that on the west side of the road, opposite the land in dispute. The plaintiffs also conceded, that they did not claim, that either they or D. Azro A. Buck had ever been in possession of the land sued for, since the conveyance to Wyman; but they claimed, that the possession, since that time, had been vacant.

The court being of opinion, that the deed from D. Azro A. Buck to Wyman would convey all the land to the middle of the stream and to the middle of the road, and the plaintiffs not contending, that any of this land could, on such construction, be exempted from the operation of the deed, a verdict was taken for the defendant, and the plaintiffs excepted to the decision of the court.

Hebard and *Martin*, for plaintiffs.

L. B. Vilas and *C. W. Clark*, for defendant.

The opinion of the court was delivered by

POLAND, J. The first question made in this case arises upon the defendant's objection, that this action cannot be sustained by the present plaintiffs, because there has been no decree made by the Probate Court, directing a division of the estate among the several heirs entitled to it; and the case of *Boardman* v. *Bartlett*, 6 Vt. 631, is relied upon, to sustain the objection. That case arose and was decided under the Statute of 1821, which expressly prohibited heirs and devisees from maintaining actions of trespass, or ejectment, for lands of the testator, or intestate, until such estate shall be set off to them by order of the Probate Court. The Revised Statutes of this State do not contain any such prohibition, and indeed no prohibition whatever, except in cases where there has been an administrator or executor appointed, who has assumed the trust of administering upon the estate. See Rev. St., p. 269, sect. 11. By the common law, upon the death of the ancestor the title immediately descended to and vested in the heir, and he was the proper party to bring an action for any injury to the realty; and as this case is clearly not within any of the prohibitions contained in the Revised Statutes, this objection of the defendant cannot be sustained and was properly overruled by the County Court.

Another and much more important question is raised in the case upon the construction of the deed from D. Azro A. Buck to Daniel Wyman,

dated September 10, 1813, as to the extent of the boundary line of the premises conveyed, and especially, whether any part of the road, or highway, mentioned in said deed, is to be considered as included within the description of the land conveyed.

There has been much discussion in this country, both by the courts and elementary writers, in relation to the rules, which should govern in the construction of deeds and grants of lands lying upon or bounded by highways, or streams not navigable; and the most perfect harmony has not prevailed among the various decisions of courts and opinions of law writers upon this subject. The following general principles, however, seem now to be pretty well established. That where one owns land adjoining to or abutting a highway, the legal presumption is, in the absence of evidence showing the fact to be otherwise, that such land owner owns to the middle of the highway; — so, also, where one conveys land adjoining to or bounded upon a highway (of which the grantor owns the fee), the law presumes the party intended to convey to the middle of the highway, and will give the deed such an effect, unless the language used by the grantor is such, as to show a clear and explicit intent to limit the operation of the deed, or grant, to the *side*, or *outer edge*, of the highway. And in all cases, where general terms are used in a deed, such as "to a highway," or "upon a highway," or along a highway, the law presumes the parties intended the conveyance to be to the middle or centre line.

The doctrine has sometimes been advanced, that where land was conveyed, which abutted upon a highway, though by a description which did not include any part of the highway itself, yet the grantee would take to the middle of the highway, upon the principle, that the highway would pass as *appurtenant* to the adjacent land. This doctrine seems now, however, to be very justly and generally exploded. The owner of the fee of the land, upon which a public highway is located, has not a mere easement in the land, which might pass as a mere *appurtenant*; but he is considered as still the real owner of the soil and freehold in the land, and entitled to the use and possession of it, so far as it can be used, or occupied, without detriment to the rights of the public to use it for a highway; and he may maintain trespass, or ejectment, even, against any other person, who commits an injury upon the soil, or makes an erection upon it.

The true reason, why this doctrine cannot be sustained, is well stated by Platt, J., in giving judgment in the case of *Jackson* v. *Hathaway*, 15 Johns. 447. He says: "A mere *easement* may, without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one *piece of land*, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries." And the law is laid down in nearly the same language by Wilde, J., in delivering the opinion of the court in the case of *Tyler* v. *Hammond*, 11 Pick. 193, and by Morton, J., in the case of *O'Linda* v. *Lathrop*, 21 Pick. 292;

and we are not aware, that this doctrine is now held, *in terms*, by any court in England, or in this country.

The question, then, whether, in a conveyance of land abutting upon a highway, the highway is included and passes to the grantee, or whether it is excluded and does not pass, becomes in all cases a matter of construction and intention merely, from the language used by the parties, and such surrounding circumstances, as are proper to be taken into the account in ascertaining the intentions of the parties, — keeping always in view the legal presumption, that the parties intended to include the highway, and that the burden is upon the party, who assumes to show, that the parties intended the contrary.

From the plan, referred to in the bill of exceptions in this case, it appears, that the piece of land conveyed by D. A. A. Buck to Wyman was a narrow strip of land, lying between the road and the branch, terminating at the south end in a sharp point, at the intersection of the road and the branch, the road there crossing the branch diagonally; and the main question seems to be in this case, as to the starting point mentioned in the deed. The plaintiffs claim, that it is at the intersection of the northern, or western, bank of the branch and the eastern edge, or side, of the highway. The defendant claims, that by a proper construction of the deed the point of intersection is where the centre line of the branch and the centre line of the road intersect, — which is several rods farther south than the point claimed by the plaintiffs. The land in dispute is between these two points.

If the position of the plaintiff, as to the point of beginning, in the description of the premises in the deed, were admitted to be correct, it would not be important to inquire, whether any part of the highway was included in the premises conveyed, or not, as we think, if the centre of the road were the boundary intended, it would have to be reached by a direct line from the starting point, and thus the land in dispute not be covered by the deed. But as the whole description is to be taken together, in order to ascertain the intent of the parties, and the proper determination of the place of beginning may be materially affected by the construction given to the deed in this particular, we have examined the case in reference to the question, whether the land conveyed goes to the centre of the highway, or only to the eastern side, or edge, thereof.

It may be proper here to notice some of the leading decisions in similar cases; though in cases, where we are merely seeking the intent of the parties from the language they have used, not very much aid can be obtained from authorities, except where the very same language is used. In the case of *Jackson* v. *Hathaway*, 15 Johns. 447, it was held, that, where land was conveyed, and bounded upon the *side* of a road, no part of the highway passed by the deed. In the case of *Sibley* v. *Holden*, 10 Pick. 249, tenants in common owned land lying upon both sides of a highway, and executed mutual deeds to make partition of their land; and in the deeds the land was described as beginning at a

stake and stones on the *side* of the road, thence, by various courses, to said road again, thence by said road to the place of beginning; and it was decided, that no part of the road was included in the conveyance, but that it still belonged to both, as tenants in common. In *Tyler* v. *Hammond*, 11 Pick. 192, a piece of land was conveyed by certain metes and bounds, and was also described as bounded upon one side of a road; and it was held, that no part of the road passed by the deed, it not being included within the metes and bounds given by the deed.

The following cases were conveyances of land bounded upon streams not navigable: and all authorities seem to agree, that the law is the same in relation to such waters, as in the case of highways. 3 Kent, 432, and notes. In the case of *Alley* v. *Little*, 5 N. H. 277, it was held, where a deed of land described it as beginning at a river, and then the line was particularly described, until it came to the river again, and was then described as running "on the southerly and easterly bank of said river to the bound first mentioned," that the conveyance did not extend to the centre of the stream, but only to the side, or bank. In *Hatch* v. *Dwight et al.*, 17 Mass. 289, the description of the land was, "Beginning at the west end of the dam on Mill River, at the upper mills, so called, thence running up the river two rods, thence westwardly, &c., thence to the bank of the river," — and it was held, that the words used clearly excluded any part of the stream.

The defendant relies mainly upon the following cases: — *Chatham* v. *Brainard*, 11 Conn. 60, where the land was described by courses and distances, and was also described as bounded *easterly on the highway*, and it was held, that the deed extended to the centre line of the road; though considerable stress seems to be laid upon the fact, that it did not appear clearly, that, by the courses and distances as given, the road was excluded. In the case of *Champlin* v. *Pendleton*, 13 Conn. 23, land adjoining a highway was conveyed by metes and bounds, without mentioning the highway; but it being made to appear, that the south line of the land and the north line of the highway were the same, it was held, that the conveyance extended to the middle of the highway. In the case of *Starr* v. *Child et al.*, 20 Wend. 149, the deed described certain premises by a line *running to the river, thence along the shore of said river to a certain street*; and it was held by a majority of the Supreme Court of New York, that the grantee took to the middle of the river. This case was afterwards carried up and decided by the Court of Errors in that State, and the judgment of the Supreme Court was reversed, and it was held, that the grantee only took to low water-mark, and that no part of the bed of the river was included in the deed. 4 Hill, 369.

To return, then, to the language of the deed in this case: — "Beginning at the intersection of the road from Chelsea village to Allen's saw mill and the branch on which the saw mill stands on the northerly *side* of said branch and nearly opposite my now dwelling house, thence on the *easterly side* of said road, until the said road strikes the bank of

said branch, thence down said branch in the middle of the channel to the first-mentioned bound." The land is described as bounded on the west by a line running on the *easterly side* of the highway; — now upon what ground can it be fairly said, the parties intended, by the *easterly side*, the *centre line* of the highway? The language, as commonly used and understood, certainly does not import that; and it seems to us, that when the case is viewed in the light of the authorities upon the subject, the great majority of them are against giving this deed such a construction, as the defendant claims for it. The case in 13 Conn. is an authority sufficiently strong to sustain the defendant's view; but that case is directly at variance with the case in 11 Pick., and, as it seems to us, cannot be sustained upon the principle established, even in Connecticut, that the highway must come within the description and cannot pass as appurtenant merely.

Where, then, is the starting point in the deed? In the first place it is to be on the northerly *side* of said branch, and, as we understand the terms used, they must refer to the *bank*, and not to the centre or thread of the stream. The line leading from this point is to follow the easterly *side* of the highway, which, as already stated, in our opinion, is to be construed to mean the eastern edge, or *line*, of the road, and not the *centre line* of the road. We come to the conclusion, therefore, from the language used in this deed, that the true starting point is at the intersection of the northerly *bank* of the stream and the *eastern side*, or edge, of the road, and that no land lying south of that point was intended to be conveyed by the deed; and also that no part of the highway was intended to be included in the deed.

The judgment of the County Court is therefore reversed and a new trial granted.

REDFIELD, J., dissenting. The importance of this case to the immediate parties would hardly justify me in making a formal dissent from the opinion of the court; and could I feel any assurance, that the decision made in this case will not hereafter be regarded, as having virtually set aside the well settled rule of law, that land bounded, by deed, or other conveyance, upon a fresh water stream, not navigable, or by the side of a highway, is to be regarded as extending to the centre of such boundary, I would surely not occupy the time of the court, or space in the reports, by making any dissent from the judgment of the court in this case.

But if I comprehend that rule, and also its application to the facts of this case, it must be regarded, hereafter, as virtually abrogated, in this State, for all useful purposes. The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one, which the American courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is, to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title, for generations, shall remain

in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up, to vex and harass those, who in good faith had supposed themselves secure from such embarrassment.

It is, as I understand the law, to prevent the occurrence of just such contingencies as these, that, in the leading, best reasoned and best considered cases upon this subject, it is laid down and fully established, that courts will always extend the boundaries of land, deeded as extending to and along the sides of highways and fresh water streams, not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance. And to have this rule of the least practical importance to cure the evil, which it is adapted to remedy, it must be applied to every case, where there is not expressed an *evident* and *manifest* intention to the contrary, — one from which no rational construction can escape. The rule, to be of any practical utility, must be pushed somewhat to the extreme of ordinary rules of construction, so as to apply to all cases, when there is not a clearly expressed intention in the deed to limit the conveyance short of the middle of the stream, or way. If it is only to be applied, like the ordinary rules of construction as to boundary, so as to reach, as far as may be, the clearly formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility, as a rule of expediency, or policy. For in ninety-nine cases in every hundred the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance, either way; hence they use words naturally descriptive of the prominent idea in their minds at the time, and, in doing so, define the land, which it is expected the party will occupy and improve. This is the view taken by Wallace, in the American notes to *Doe ston* v. *Payne*, 2 Smith's Leading Cases, 90, where the cases upon this subject are collated and compared.

The general rule as to monuments undoubtedly is, that the centre of such monuments, stake, stone, tree, rock, &c., is intended, when lands are so defined. So, also, in regard to highways and streams, when referred to in deeds as the limits of the grant, or conveyance, the middle is to be presumed to be the limit, unless the contrary be clearly expressed. The real boundary, then, is the belt of land extending along the highway, or stream, between the margin and centre. And this will ordinarily be referred to, as extending to the road, or the stream, as to a wall, or stone, or tree, &c., — the intention being to convey one half of the monument.

But if land be bounded, as extending to other land of the grantor, or along another strip of land, ever so narrow, owned by the grantor, it will be supposed the margin of the land is intended. *Seventeenth Street*, 1 Wend. 262. *Lewis Street*, 2 Ib. 472. *Livingston* v. *Mayor of New York*, 8 Ib. 85. But in this case there is no ground to sup-

pose, that the party, while describing one piece of land, intended to convey half of another piece, as appurtenant to it. Land cannot be conveyed, as appurtenant to other land; if conveyed at all, it must be as parcel of the land conveyed. And it is this rule, which the Massachusetts courts have attempted to apply to the case of lands bounded along the side of a highway. *Tyler* v. *Hammond*, 11 Pick. 94. *Webber* v. *Eastern Rail Road Co.*, 2 Met. 147. The Massachusetts courts, too, have repudiated Chancellor Kent's view, — 3 Kent, 433, — *in toto*. But if anything whatever is attempted to be made out of the rule, beyond mere show, the reasoning of the Chancellor is the only ground, upon which it can stand, that is, to treat it as a rule of policy merely (and not one of intent chiefly), to be applied to all cases, where there is not a clearly defined intention to the contrary.

This rule we find fully adopted in two elaborate and well considered cases in Connecticut, — *Chatham* v. *Brainard*, 11 Conn. 60, and *Champlin* v. *Pendleton*, 13 Conn. 23. The same rule is now fully established in New York, both as to highways and streams, putting them both upon the same ground: *Starr* v. *Child*, 20 Wend. 149; *Canal Commissioners* v. *People*, 5 Wend. 423; s. c. 13 Wend. 355; and this notwithstanding the decision in *Starr* v. *Child* was reversed by the Court of Errors [4 Hill, 369], by a vote of eleven to ten, — the vote constituting the majority being perhaps that of some senator, who had acquired his knowledge of law in a counting room or upon a canal boat. The New York courts have repeatedly refused to regard the decision of their Court of Errors as evidence of the law, in that State even, except as to the particular case; and it has never been regarded elsewhere as much evidence of the law of any case. This same rule has been adopted in many of the other American States. It only remains to inquire, how far it applies to the present case.

It seems to me, that there is no difficulty in applying the terms used in this conveyance in the manner for which I contend. The place of beginning is "the intersection of the stream and the highway on the northerly side and nearly opposite my now dwelling house." The mention of the dwelling house of the grantor is evidently referred to, to show in what vicinity the "intersection" is, — not to fix any particular point, as the point of beginning. The term is not the *point* of intersection, but the intersection of the whole stream and the whole highway. The northerly side of the stream is named, not to fix any starting *point*, but to show upon which side is the land, as the grantor owned land upon both sides, and the intersection was upon both sides. And it is evidently not a point upon the bank, which was intended to be fixed as a starting point, as the returning line of the circuit is expressly defined to be in the middle of the stream and to return to the "first mentioned bound," — which would be impossible and absurd, if the bound were upon the bank of the stream. And every contract should be so construed, as to give every portion its just operation, when that can be done. "Thence on the easterly side of said road" is wholly

consistent with the rule, for which I contend, and with the decided cases upon this subject. "Until said road strikes the bank of said stream" comes next; and it does not seem to me, that there is any difficulty with this, upon the view I take of the case. If the side of the road means one half of it, and so of the bank of the stream, then when they come in contact it answers the call. And it is evident, the term *bank* is here used in the precise sense, for which I contend, as the description proceeds. "Thence" (that is, from the bank) "down said branch, in the middle of the channel, to the first mentioned bound."

Now I submit, that the language of this description in general, as to the terms used, *more strongly* indicates an intention only to go to the margin of the stream, than it does to the margin only of the road, aside from the *express provision* in regard to the easterly *side* going to the *middle* of the channel. The ends of this line are defined to be on the "northerly side of the stream" and "the bank of said branch," and yet the line between these two monuments is expressly defined to be "in the middle of the channel;" thus showing, that the other terms are used to imply an extension to the "middle of the channel." Why, then, it may be asked, shall we not hold, that, "the easterly side of said road" means the easterly half of said road, as well as of the stream. It does seem to me extremely difficult to escape from this conclusion by any satisfactory reasoning, which does not, at the same time, subvert all the leading cases upon this subject, and, in effect, overthrow the rule itself.

The consideration, too, that the ancestor of the plaintiffs had never made any claim to this land for more than twenty or thirty years, and had no suspicion of any such title remaining in him, goes very far, in my mind, to corroborate the view, which I have taken of the case. For these reasons I cannot concur with the decision of the court.[1]

BANGOR HOUSE PROPRIETARY *v.* BROWN.

Supreme Judicial Court of Maine. 1851.

[*Reported* 33 *M.* 309.]

Shepley, C. J.[2] An aqueduct, owned by the plaintiffs, appears to have passed through a street, formerly called Centre Street, in front of the defendant's dwelling-house, nearer to it than the centre of the street, and about six feet below the surface of the earth.

A lot of land numbered seventeen, a part of which constitutes the defendant's house lot, was conveyed by the owners to Elliott Valentine,

[1] *See Hudson v. Troy & Worcester R. R. Co.*, 2 R. I. 508; *G. R. & I. R. R. Co. v. Hazel*, 24 Mich. 62; *Hamlin v. Principal Mfg. Co.*, 141 Mass. 51.

[2] Only the opinion is given.

on September 28, 1832, bounded "southerly on Centre Street, there measuring one hundred and twenty feet," "as the same is laid down on a plan drawn by Zebulon Bradley, in December, 1829." The title of the defendant is derived from Valentine.

The owners of land, including this lot, caused Bradley to draw a plan thereof in December, 1829, and to designate upon it building lots and streets. They soon afterwards caused Centre Street to be prepared for use as a street or way.

As the law has been established in this State, when land conveyed is bounded on a highway, it extends to the centre of the highway; where it is bounded on a street or way existing only by designation on a plan, or as marked upon the earth, it does not extend to the centre of such way.

The occasion of such difference in effect may be ascertained. The owner of land, who has caused it to be surveyed and designated as containing lots and streets, may not be able to dispose of the lots as he anticipated, and he may appropriate the land to other uses: or he may change the arrangement of his lots and streets to promote his own interest, or the public convenience in case the streets should become highways. He does not by the conveyance of a lot bounded on such a way hold out any intimation to the purchaser, that he is entitled to the use of a highway to be kept in repair, not at his own, but at the public expense, for the common use of all. While he does by an implied covenant assure to him the use of such designated way in the condition in which it may be found, or made at his own expense. By a repurchase of that title, the former owner would be entitled to close up such way, as he would also by obtaining a release of the right of way.

There is no indication in such cases of an intention on the part of the grantor to dispose of any more of his estate than is included by the description, with a right of way for its convenient use.

When a lot conveyed is bounded on a highway expected to be permanent, the intention to have it extend to the centre of it is inferred, (among other reasons noticed by this court in former cases,) from the consideration that the vendor does not convey or assure to the vendee a right of way, the law affording him in common with others a more permanent and safe public way, to be kept in repair at the public expense. The vendor not being burdened by an implied covenant, that the vendee shall have a right of way, has no occasion to retain the fee of the highway for that purpose. Hence arises one motive inducing him to convey all the rights, which he can convey to land covered by the highway.

In argument for the defendant it is insisted, that Centre Street at the time of the conveyance had become a highway by dedication of the owners of the land.

It might be sufficient to observe, that such a position does not appear to have been presented at the trial, for decision by the jury or for instruction by the court.

Without insisting upon this, the testimony presented in the bill of exceptions does not sustain the position.

If an owner of land should cause it to be surveyed into lots and streets, and a plan thereof to be made, and should also cause the streets to be made convenient for use, and continue to keep the land enclosed as his own property, it would not be contended, that a dedication of it to the public could be inferred from these acts. There must be some act of the owner, from which it can be clearly inferred, that he intended to surrender it for public use, and not for the use of certain persons only. The simple facts, that a person pursued such a course respecting his land, and that he opened a way for the use of a purchaser of a lot, would not, alone considered, authorize an inference that it was dedicated to the public for common use. There should be some evidence, that it was generally used with his knowledge, as public convenience might require, to authorize such a conclusion. Nor could the owner compel the public to accept and adopt such streets as highways. There should be evidence that they had been commonly used to authorize an inference, that they had been accepted as public ways.

In this case, there is not only no evidence that Centre Street at the time of the conveyance of the defendant's lot to Valentine had been used as a public way, but there is evidence, that it was not kept in repair, and that part of it only is used as a street.

Exceptions overruled, and judgment on the verdict.

McCrillis and *Crosby*, for the defendant.

Rowe and *Bartlett*, for the plaintiffs.

PAUL *v.* CARVER.

SUPREME COURT OF PENNSYLVANIA. 1856.

[*Reported* 26 *Pa.* 223.]

ERROR to the District Court of Philadelphia.

This was an action of ejectment brought in the court below by Alexander B. Carver, against James W. Paul, to recover a certain strip or piece of ground, being the northern part of the soil of Tidmarsh Street as formerly laid out between Twelfth and Thirteenth and Christian and Catherine Streets, in the consolidated city of Philadelphia. In 1805, John Lownes, being the owner of a large tract of land in the township of Moyamensing, in the County of Philadelphia, called "Barnfield," including the land in dispute, by his will directed that a street fifty feet wide should be laid out either by the public or his heirs, through this property, in a line with Carpenter Street, to be called Tidmarsh. In 1827, the part of Tidmarsh Street now in dispute was opened by the public authorities. In 1845, it was changed so as to make its course correspond with the direction of the streets in the city proper, and in

1850, an Act of Assembly was passed vacating this part of Tidmarsh Street.

In 1817, the Lownes family conveyed to John H. Brinton, by a deed which called for a lot on the north side of Tidmarsh Street, and easterly side of Shippen's Lane. In 1836, Mrs. Brinton, being the owner of part of the premises devised by John Lownes, conveyed a portion of the same to William Perry, the deed describing the premises among other things as extending "along the east side of Thirteenth Street one hundred and fifty-four feet more or less to Tidmarsh Street, thence south-easterly, *along the northerly side of the said Tidmarsh Street*, four hundred and one feet more or less to Twelfth Street."

Perry executed a mortgage to Mrs. Brinton to secure the unpaid purchase-money, upon which proceedings were afterwards instituted, and the premises, under a *levari facias*, were sold to the plaintiff, Carver, and a sheriff's deed executed and acknowledged to him on the 8th day of January, 1853.

The commissioners of Moyamensing, to March Term, 1847, of the District Court, filed a claim, against Perry, owner, in which this part of the premises was described as "a lot of ground situate on the west side of Twelfth Street in the township of Moyamensing, beginning at the south-west corner of Christian and Twelfth Streets, and extending southward, along the west side of Twelfth Street, two hundred and forty-eight feet, three and one half inches, *to the centre of old Tidmarsh Street* (vacated or about to be vacated), thence extending westward, along the centre of old Tidmarsh Street aforesaid, four hundred and two feet to Thirteenth Street." Judgment was duly obtained upon this claim; and, under proceedings thereon, the premises were sold to Samuel R. Blair, and a sheriff's deed duly made to him, and he conveyed to Rockhill. After the street was vacated Rockhill entered upon and reclaimed the southermost portion of the street adjoining the premises purchased by him. This strip of twenty-five feet three inches became vested in the defendant James W. Paul, against whom this ejectment was brought by Carver, alleging that the title to the same became vested in him under his purchase, on the proceedings upon the mortgage given by Perry to Mrs. Brinton.

The court below ruled that under the sale upon the mortgage the plaintiff had a title to the middle of the street, and that being vacated by authority of law, he was entitled to recover possession.

The jury found for the plaintiff.

The defendant sued out this writ, and assigned the ruling of the court for error here.

G. W. Biddle, for plaintiff in error.

E. K. Price and *Lex*, for defendant in error.

The opinion of the court was delivered by

Lewis, C. J. The general rule is well established that where a stream not navigable is called for in a deed as a boundary or monument, it is used as an entirety to the centre of it, and to that extent the fee passes.

It would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the grantee, in such cases, to the edge of the river: 3 Kent's Com. 428. So land bounded by an artificial ditch extends to the centre of the ditch: 6 Conn. 471. So, where a street is called for as a boundary, the title passes to the centre of the street. "The law with respect to public highways and to freshwater rivers is the same, and the analogy perfect as concerns the right of soil. The presumption is that the owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil subject to the right of passage in the public:" 3 Kent's Com. 432. Chancellor Kent declares that "the established inference of law is that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant. The idea of an intention in a grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to universal practice: and it was said in *Peck* v. *Smith*, 1 Conn. Rep. 103, that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It would require an express declaration, or something equivalent thereto, to sustain such an inference:" 3 Kent's Com. 433. If no other reason could be assigned in support of this rule of construction, the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights, ought to have great weight. A contrary opinion would introduce a flood of unprofitable litigation. But the rule has its origin in a regard to the nature of the grant. Where land is laid out in town lots, with streets and alleys, the owner receives a full consideration for the streets and alleys in the increased value of the lots. The object of the purchasers of lots is to enjoy the usual benefits of the streets. The understanding always is that houses may be erected fronting on the streets, with windows and doors, and doorsteps and vaults. These latter always extend beyond the line of the street, and it is necessary that they should so extend. If a right of property in the streets might, under any circumstances, be exercised by the grantor, he might deprive his grantee of the means of entry into or exit from his house, and of all the enjoyments of light and air, and might thereby deprive him of the means of deriving any benefit from his purchase. In large cities vaults under the sidewalks for receiving fuel and other necessaries are almost universally constructed. In some instances where lots are owned by the same person on each side of the street, these vaults extend entirely across it, forming an under-ground communication between the two properties. Shade trees, posts, awnings, and many other convenient structures, are constantly erected. All these might be prohibited by the original grantor, if his right of property remained after parting with the lots. If the streets were to be vacated, of what value would they be to the original grantors, unless for the purposes of annoyance to the lot owners? A long strip of

ground fifty or one hundred feet wide and perhaps several miles in length, without any access to it except at each end, is a description of property which it is not likely either party ever contemplated as remaining in the grantor of the lots on each side of it. Influenced by these considerations, the law has carried out the real intention of the parties by holding that the title passed to the centre of the street subject to the right of passage. Where a street is called for as a boundary it is regarded as a single line. The thread of the road is the monument or abuttal: 8 Cush. 595. Measurements are of small importance where monuments are called for. Monuments control measurements. There is no doubt whatever as to the existence of the general rule; but it is thought by the plaintiff in error that where the deed calls for a particular *side* of a street the case is taken out of the rule. In our opinion this is a circumstance entirely too insignificant to produce a result so inconvenient and so contrary to the practice of the people. This very question was decided when these parties were here, in another form of action. It is therefore unnecessary to examine in detail either the English or American decisions on the subject. While they all fully recognize the existence of the rule that a conveyance of land bounded by a highway passes to the grantee a title to the centre of the way, there is some difference of opinion in the application of it to particular cases. A rule founded upon policy, and tending to guard against inconveniences of the most alarming character, ought not to be frittered away by distinctions founded on differences in phraseology, which might readily escape attention. The paramount intent of the parties, as disclosed from the whole scope of the conveyance, and the nature of the property granted, should be the controlling rule. Although the measurement of the distance set forth in the conveyance brings the line only to the *side* of the road, this is not sufficient to control the rule of law which carries the title to the centre of it: *Newhall* v. *Ireson and another*, 8 Cushing, 598. Although the deed says nothing about a highway, and although the *south* line of the land conveyed corresponds with the *north* line of the highway, as originally laid out, still this strong circumstance has been held entirely insufficient to control the general intendment of law that the title passes to the centre of the highway: *Champlin* v. *Pendleton*, 13 Conn. Rep. 23. Even where a grant described the land as "beginning on the *westerly side* of the county road," "thence running northerly, *touching the said westerly side* of said road forty rods," this description was held to be insufficient to control the rule of law which extends the title to the centre of the road: *Johnson* v. *Anderson*, 18 Maine Rep. 76. The case last cited disposes of the identical question now before us, and we adopt it as a sound exposition of the law. In our own State we have no authoritative decision on the question. *Black* v. *Hepburn*, 2 Yeates, 331, was a Nisi Prius decision, and the case seems to have been determined on the principle that ejectment would not lie for an easement. *The Commonwealth* v. *McDonald*, 16 Ser. & R. 390, was an indictment for erecting a nuisance

in a public highway, in which it was distinctly stated that the *public* right to the highway, and that only, was decided. *The Union Burial Ground* v. *Robinson*, 5 Wharton, 18, was the case of a conveyance before the street was opened and the deed called for "the south side of Washington Street, *as the same may hereafter be opened*." The measurement of one of the lines, terminating at that point, was also stated with great particularity in feet, inches, and fractions of an inch. It may be that these circumstances ought to have had but little weight; but we find that they influenced the decision, and that the court carefully stated that the case of a lot, bounded on a street laid out and dedicated to public use at the time of the grant, would present a different question. That case is therefore no precedent for one like the present.

The other assignments of error do not require any special notice. The whole case was properly disposed of by the District Court.

Judgment affirmed.[1]

FISHER *v.* SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1857.

[*Reported* 9 *Gray*, 441.]

ACTION of tort for breaking and entering the plaintiff's close in Dedham, and cutting down trees and digging up and carrying away the soil.[2]

At the trial in the Court of Common Pleas at December Term, 1855, before *Byington*, J., it appeared that the *locus in quo* was a strip, two or three rods wide, of land conveyed to the plaintiff on the 16th of July, 1844, and had been used time out of mind as part of a road or passage-way leading from the old Providence road, now called Walpole Street, northwesterly to the plaintiff's dwelling-house, and to wood-lots and pasture of other persons using the way.

The defendant justified the acts complained of under a claim of ownership in the fee of the way, westerly of the centre thereof, under a deed from the plaintiff to him dated July 16th, 1844, of "a certain tract of land situated in the South Parish of said Dedham, containing five acres, more or less, bounded easterly on the road or leading way from my dwelling-house to the old post road, so called; southerly, on said old post road," &c. The court ruled that this deed conveyed to the defendant the fee in the land to the centre of said road or leading way, subject to the right of way of the plaintiff and others, as aforesaid; and ordered a verdict to be rendered for the defendant.

[1] See *Woodman* v. *Spencer*, 54 N. H. 507; and see *Kneeland* v. *Van Valkenburgh*, 48 Wis. 434.

[2] Part of the case is omitted.

It was admitted that the acts of trespass complained of were done westerly of the centre of said way, between the travelled part of said way and said wall, row of stones, and stake and stones.

A verdict was returned for the defendant, and the plaintiff alleged exceptions.

W. Colburn, for the plaintiff.

E. Wilkinson, for the defendant.

By the Court. The rule is well settled in this Commonwealth, that a deed of land bounded on a highway laid out over land of the grantor passes the fee to the centre of the way, where there is nothing in the deed to require the opposite construction. A majority of the court are of opinion that the same rule extends to private ways.[1]

COX *v.* FREEDLEY.

Supreme Court of Pennsylvania. 1859.

[*Reported* 33 *Pa.* 124.]

Error to the Common Pleas of Montgomery County.

This was an ejectment by Jacob Freedley against Abraham R. Cox, for a lot of ground in the borough of Norristown, beginning at a stake for a corner on the southeasterly line of Penn Street, being thirty-four and two tenths feet from the corner of Markley Street, thence to the corner of Penn and Markley Streets, thence along the easterly line of Markley Street one hundred and twenty-three feet to a stake for a corner in the said line of Markley Street, thence a straight line one hundred and thirty-three and seven tenths feet to the place of beginning; containing eight perches, or thereabouts.

John Freedley, being the owner of a larger property in the borough of Norristown, on the 5th November, 1849, conveyed to Abraham R. Cox, the defendant, a portion of it, described as follows, to wit: —

"All that certain messuage and lot or piece of land situate in the borough of Norristown aforesaid, bounded and described as follows, viz.: beginning at a stake on the northeast corner of Egypt and Race Streets, and thence along the northeast side of said Egypt Street, south forty-eight degrees five minutes east, ninety-one feet eight tenths, to a stake in the middle of a ten-feet-wide alley between this lot and other property of said Abraham R. Cox; thence, along the middle of said ten-feet-wide alley, north forty-one degrees and fifty-one minutes east, one hundred and eighty-three feet and two tenths, to a stake on the south-west side of Penn Street; and along said side of said street, north sixty degrees forty-five minutes west, fifty-four feet and two

[1] See *Morgan* v. *Moore*, 3 Gray, 319; *Coburn* v. *Evans*, 1 All. 443; *Stark* v. *Coffin*, 105 Mass. 328; *Clark* v. *Parker*, 106 Mass. 554; *McCoy* v. *Sampson*, 119 Mass. 231; *Gould* v. *Eastern R. R. Co.*, 142 Mass. 85. But cf. *Mott* v. *Mott*, 68 N. Y. 246.

tenths, to a stake on the south corner of Penn Street and Race Street aforesaid; and along the southeast side of said Race Street, south fifty-four degrees forty-six minutes west, one hundred and seventy-four feet and four tenths, to the place of beginning."

On the 10th September, 1851, John Freedley conveyed the remainder of the premises to Jacob Freedley, the plaintiff; and by his deed, the property was described as bounded on Race Street as follows: "thence along the southeast side of said Race Street, south fifty-four degrees forty-six minutes west, one hundred and seventy three and four one hundredths feet to the easterly corner of said Race and Egypt Streets."

Race Street was laid out and opened in 1834; and on the 28th May, 1855, it was duly vacated, and a new street, called Markley Street, was laid out and opened, partly on the bed of the said Race Street, leaving a strip of ground between the side of the new street and the defendant's ground, but not extending to the centre of the old street, containing about eight perches. The defendant took possession of this strip, and for it the present ejectment was brought.

The court below (*Smyser*, P. J.) delivered the following charge to the jury: —

"The material and only question here is, whether the boundary line between the parties is the middle or the southeasterly side of old Race Street, which was vacated in 1855. If the former, then the defendant would be entitled to your verdict; if the latter, your verdict would be for the plaintiff for the land demanded in his writ. So long as Race Street remained a public highway, and subject to the right of passage on the part of the public, this was a question of little practical moment to the parties, for neither could occupy or use the portion of land in controversy, and which fell within the lines of the street. The street being vacated, the territory in dispute is thereby thrown open again to private occupancy. The defendant is in possession; his right to retain that possession will depend upon whether the line between the parties is at the middle or side of the street.

"The general rule in all such cases is, that where a deed calls for a street or a stream as a boundary, the boundary is the middle of the stream or street, and to that line the fee passes. And the right to the centre of the street will pass, although the deed calls for a certain side of it only, and even although the distance called for by the deed, if measured, will reach to the side only; so that a grant of land beginning at, say, the north side of a street, and running along said north side of said street a number of rods, will nevertheless extend to the middle of the street in spite of these seemingly strong and emphatic words.

"The general rule I have stated, being one of policy and convenience, can only be controlled and deprived of its operation by the express terms of a deed, showing, in plain and unambiguous terms, the intention of the grantor to limit the title to the side, instead of extending it to the middle of the street. The same effect would follow a certain and immemorial usage. The question here arises, in the first place, on

the deed from John Freedley to defendant; for it must be remembered that, at that time, the former owned all the land, both tracts, and did not convey the residue to plaintiff until nearly two years after. He therefore only reserved to himself what he did not convey to Cox, and could only convey to Jacob Freedley what he had reserved to himself.

"Now, looking at the deed to Cox in 1849, we find what I regard as an express exception, or clear and unequivocal declaration of an intention to limit the grant to the side of the street. An examination of this deed not only shows that the side of the street is called for, and that the measurement of the distances called for terminate in that side (which I have said, would not of themselves control the legal rule), but it refers to monuments, to wit, *stakes*, standing or placed in the side, at distances corresponding with those given in the deed; those distances themselves, many of them, being given, even to minute fractional parts. This reference to fixed monuments in the side of the street seems to locate the boundary, and to leave no doubt as to what was the paramount intention of the parties to the conveyance, which intent is the controlling rule.

"It is the duty of the court to expound and give a construction to written instruments; and were this question to be determined on the deeds alone, I would unhesitatingly construe them in the manner just stated, and give a binding instruction to the jury accordingly.

"But there has been parol evidence given on both sides, to aid the written evidence, in arriving at their construction, and the actual intent of the parties, and this without objection by either party. The plaintiff, for instance, has shown the location of the head-race of the mill on his property, to be along or near the middle or centre line of old Race Street, to show the improbability, as a question of intention, that John Freedley, when he owned both tracts, and sold off the lower one to Mr. Cox, could have intended to convey to the centre of the street, and thus cramp and confine himself in the use and repairing of his race, by having the line of an adjoining owner almost touching it. Whilst the defendant has shown a fence or enclosure on the lower or Cox tract from 1834, with little interruption, up to the present time; and this for the purpose of showing a long-continued and immemorial usage in conformity with the right now claimed by him, and as fixing and showing the intention and understanding of all parties, that the real dividing-line was meant to be the middle of the street.

"The effect of this mingling of parol and written evidence is, to draw to the jury the determination of the question of intention. *Evans* v. *Negley*, 13 S. & R. 221.

"Whilst, therefore, you will receive with respect our construction of the deeds, you will examine carefully the extrinsic circumstances *dehors* the deeds, and taking the whole together, endeavor to ascertain what was the real intention of the parties to the conveyance, and whether it was such as the defendant alleges, or any other and different one from that which the written evidence alone discloses, and render your verdict

accordingly. I have the less difficulty in so submitting the case to you, inasmuch as the parol evidence submitted on both sides, which draws to the jury the determination of the fact, was put in without any objection on either side, either on the trial or argument thereof to the jury."

To this charge the defendant excepted; and a verdict and judgment having been rendered for the plaintiff, the defendant removed the cause to this court, and here assigned the same for error.

Boyd, for the plaintiff in error.

Krause and *McMiller*, for the defendant in error.

The opinion of the court was delivered by

Woodward, J. The case of *Paul* v. *Carver* was twice before this court, and is twice reported, 12 Harris, 207, and 2 Casey, 223.

On the last hearing, it came down to the question, whether the owner of a city lot, whose deed is bounded "*along the northerly side*" of a particular street, has title to the centre of the street, so that after vacation of the street by public authority, he may recover in ejectment the ground lying between the northerly side and the centre. In deciding this question in favor of the plaintiff, we admitted that the intention of the parties was to control the construction of the deed, and that they might define their intention to be bounded by the side of the street so explicitly as to limit the right; but we held, that such intention was not to be inferred from the words "along the northerly side," nor from measurements of the rectangular lines that would terminate at the side.

That the decision was well supported by reason and authority, was fully shown by the learned judge who delivered the opinion. I relieve the present case of much discussion, by reference to what was said when that case was before us, especially the last time.

We have here for construction the words contained in the deed of John Freedley to Abraham R. Cox, of 5th November, 1849.

It describes a lot in the borough of Norristown, by courses and distances, and by streets and lanes. "Along the north-east side of Egypt Street" and "along the south-east side of Race Street," are two parts of the description. The measurements to these streets would terminate at their sides respectively.

Now, applying the ruling in *Paul* v. *Carver* to this description, is it not perfectly manifest that we must say Cox took to the middle of Egypt and Race Streets?

And why should not the doctrine of that case be applied?

It was maturely considered and unanimously pronounced. It was shown to be agreeable to the general principles of the common law, as laid down by Chancellor Kent and other text writers, and as they had been applied in numerous cases, in England and our own country. It was shown also to be sanctioned by the general sense and understanding of the people, and that any doubt or denial of it would introduce intolerable inconvenience, confusion, and litigation.

It was well known, that there were cases in the books inconsistent with this doctrine. Our own case of the *Union Burial Ground* v. *Robinson*, 5 Wh. 18, was relied on then, as it is now, but that case, if confined to its circumstances, is not authority here. The street in question there, never had any existence, except on paper. Though laid out, it was never opened through the land that was in controversy, and it would seem, could not have been, without a previous order made and granted by the supreme executive council, directing it to be done, which did not appear to have been applied for or obtained.

The court held, that the grantee should be limited by the very precise measurements expressed in his deed, which brought him *to* and not *into* this imaginary street, and they left the right of soil in the whole street in the grantor, — a doctrine, this last, which is not to be applied to streets actually opened and used by the public, as is shown by *The Case of the Penny Pot Landing*, 4 Harris, 89. That was the case of an addition made to the width of Vine Street, in the city of Philadelphia, by the agents of William Penn, in 1690, and this court held, that the rights of the adjacent and neighboring lot-holders, as well as the public, to Vine Street so enlarged, were vested rights of which they could not be divested by William Penn or his successors. And this is the general principle in all towns. The dedication of streets, lanes, and alleys divests the proprietor of his right of soil therein, and purchasers of lots bounded on streets acquire title *usque ad filum mediæ*, unless there be a very express limitation of their grants to the margin of the street.

The law with respect to public highways and unnavigable streams is the same, in respect to the presumptions that arise from grants bounded thereon; and the general principle is, that there must be a reservation or restriction expressed or necessarily implied, which controls the operation of the general presumption, and makes the particular grant an exception, or else the grant carries the grantee to the middle of the stream or highway: *per* Nelson, J., in *Howard* v. *Ingersoll*, 13 Howard, 421. In the elaborately considered case of *Child* v. *Starr*, 4 Hill, 369, overruling *Starr* v. *Child*, 20 Wend. 149, it was held by the Court for Correction of Errors in New York, that lines running to a monument standing on the bank, and from thence running *by the river* or *along the river* do not restrict the grant to the bank of the stream: see also the note to *Ex parte Jennings*, 6 Cowen, 536.

On the other hand, there are not wanting authorities to the effect that when the descriptive words are "by the side of," "by the margin of," or "by the line of" the stream, the underlying soil is excluded: 10 Pickering, 249; 5 Denio, 599; 6 Mass. 435.

But it was with a knowledge of such authorities, Judge Lewis remarked, in *Paul* v. *Carver*, that the circumstance of being bounded by the *side* of a street, instead of the street itself, was entirely too insignificant to produce a result so inconvenient, and so contrary to the practice of the people.

And when it is considered, that the laying out and dedication of streets in a town, divests the proprietorship of the original owner; that every purchaser of a town-lot buys with reference to the existing highways, would not pay the price he does if it were not for those highways, and yet, that power exists in the government to vacate every such highway, — this doctrine becomes a most reasonable and necessary one.

Without it, any lot-owner who has built on the line of his lot, may be shut into his house without the possibility of stepping out, except he trespass on his neighbor.

It is not probable, that any lot in the borough of Norristown would have been paid for and built on in the manner it has been, if it were not for the understanding, that the owner was forever to go out and come in on the ground in front of him. He may or may not have adverted to the precise phraseology of his deed, he may or may not have remembered the public right to vacate the street in front of him: but he has looked from the first to the ground of that street, for his means of ingress and egress; and we should carry consternation into that flourishing town, and into all our boroughs and cities, if we should tell the people that their rights in the streets which bound them terminate with the public franchise of passage.

Deeds may expressly exclude the streets, but unless they do, the implication is, from such terms as are found in this deed, that half the street is included. Unless we say this, we must reverse *Paul* v. *Carver*, and we see no ground for reversing or questioning a case so carefully decided. It can scarcely be said to be in conflict with the case of the Union Burial Ground, and though it is inconsistent with some extra State adjudications, it seems to us more worthy to be followed than they are.

Terms of description such as these, may be regarded, therefore, as having a technical meaning, and as importing a grant to the middle of the street, unless controlled by something else in the deed.

The only thing the learned judge found to control them was the word "stakes." At the northeast corner of Egypt and Race Streets, and at the south corner of Penn and Race Streets, stakes are mentioned. These the learned judge considered fixed monuments. If they were such, they could not be *in* the street, any more than, in some of the water cases referred to, the marked trees or stakes could have stood in the middle of the stream.

Where surveys are bounded on streams or streets, the marks which denote them, if higher than the surface of the water or ground, must necessarily stand on the margin. Sometimes a stone and ring are planted beneath the surface, and then they are expected to be at the very corner or line.

But what sort of a monument is a stake? It is so unsubstantial, that in country surveys, it usually indicates a corner which the surveyor never visited, and which exists only on paper. Artificial boun-

daries which are meant to be fixed monuments, are made with more care than merely sticking a stake, which the next wind may blow over, which one of a thousand accidents may destroy, and which must rapidly decay, if not otherwise obliterated. So frail a witness is scarcely worthy to be called a monument, or to control the construction of a deed in so important a particular as that under consideration.

Nor can we regard the intention of the parties, as found by the jury, the true criterion of construction. There was no ambiguity on the face of the deed. The question raised was, what were the legal import and significance of the words employed by the parties? That was a question for the court, and not for the jury. The jury were no more to measure the legal effect of these terms, than they would be permitted to judge of words of inheritance or perpetuity in a deed.

The intention of the parties, as deduced from the language of the instrument, was the criterion of construction, and in making that deduction, the court would look at the circumstances in which the conveyance was made, — at the fact that Mr. Freedley might naturally desire to retain the proprietorship of Race Street for the protection of the head-race of his mill; and on the other hand, that Cox was buying town property with reference to surrounding streets. In reference to Freedley's interest in the head-race of his mill, the principle decided in *Seybert* v. *Levan*, 8 Barr, 383, should not be lost sight of, in settling the construction of the deed; for if he retained the right to enter for repairs notwithstanding his conveyance, there would be less reason for restricting the descriptive words to the margin of the street.

The judgment is reversed, and a venire facias de novo *awarded.*[1]

BISSELL *v.* NEW YORK CENTRAL RAILROAD COMPANY.

COURT OF APPEALS OF NEW YORK. 1861.

[*Reported* 23 *N. Y.* 61.]

APPEAL from the Supreme Court. Action to recover the possession of land in the city of Rochester. The plaintiffs claimed title under William W. Mumford. Upon the trial it was proved that, in 1825, Mumford was the owner of one half of a block of land in the city of Rochester, including the premises in controversy, which tract was surrounded on all sides by streets opened and used as public highways. He caused his portion of the block to be surveyed and subdivided into lots, and a map to be made representing such lots as abutting upon a street extending from Kent Street, one of the boundaries of his tract, through the centre thereof, and also through the land of adjoining proprietors, to Jones Street. This proposed avenue was designated on the map as Erie Street, and that part of it within Mumford's allotment was

[1] See *Salter* v. *Jones*, 39 N. J. L. 469.

the land in controversy in this action. Mumford proceeded to sell, and did sell, all of his lots, by deeds, describing them according to their number upon his map, in this manner: "Lot No. 1, section G, according to allotment and survey of part of Frankfort [a portion of Rochester including Mumford's tract], made by Elisha Johnson; said subdivision being thirty-three feet front and rear and seventy feet deep:" but without any mention of or reference to said street by name. Mumford's grantees entered upon such lots and built thereon, and the strip denominated as a street was used by them for access to their lots, and was opened so far as Mumford's land extended; but was not opened through the other half of the block to Jones Street. It did not appear that the owner of the other half of such block plotted his ground into city lots, or in any way assented to the opening of a street through the same; and a fence was kept up by him between his portion of such block and that of Mumford. The defendant acquired all the rights of the several grantees of lots from Mumford, and was in occupation of the same and of the land between, designated as Erie Street, which it had covered with a warehouse and other structures. The judge, under exception by the defendant, directed the jury to find a verdict for the plaintiffs. The judgment entered thereon was affirmed at General Term in the Seventh District, and the defendant appealed to this court.

Henry R. Selden, for the appellant.

Theron R. Strong, for the respondents.

MASON, J. The question presented for adjudication in this case is, whether the several deeds of conveyance executed by William W. Mumford, between the years 1828 and 1845, to different individuals, conveying lots on either side of Erie Street, in the city of Rochester, carried the lands to the centre of that street. These deeds describe the lots invariably by their numbers: "*reference being had to the allotment and survey made by Elisha Johnson.*" In some cases the size of the lot is given: "being thirty-three feet front and rear, and ninety-nine feet deep." There is no express mention of any street in any of the deeds. It appears that, before selling any of the lots, Mr. Mumford, the original proprietor of these lands, placed his map, or a copy of it, in the hands of agents engaged in selling his lots, and that they made sales in reference to the map. On this map the lands in controversy are laid down as "*Erie Street;*" and these lots conveyed lie both on the north and south sides of "*Erie Street.*" The simple question, then, is, whether a conveyance of a lot bounded on a piece of ground thus laid out upon the map as a street, and called a street, but which is not, in fact, a public street or highway, carries the grantees to the middle of the street. The question, so far as it is here presented, involves merely the construction to be given to these deeds. The inquiry is as to the extent of the grant.

If the rule of construction in regard to such grants is not to be considered as settled in this State, I am inclined to hold that the inference of law is, that such a conveyance carries with it the fee to the centre of

the street, as part and parcel of the grant. There is no more reason, it seems to me, to infer an intention in the grantor to withhold his interest in or title to the land covered by the street, after parting with all his right and title to the adjoining land, than there is in the case of a deed bounded by a public highway.

I have not been able to discover any reason which can be given in the one case, which is not equally applicable to the other. The rule of construction is well settled in regard to a deed bounded by a public highway. The established inference of law is, that a conveyance of land bounded on a public highway carries with it the fee to the centre of the road as part and parcel of the grant. 2 J. R. 363; 15 Id. 452; 1 Cow. 240; 3 Kent's Com. 433, 3d ed. The rule seems to be based upon the supposed intention of the parties, and, it seems to me, upon a very reasonable intention. The idea of an intention in a grantor to withhold his interest in a highway to the middle of the street, after parting with all his right and title to the adjoining land, ought never to be presumed; and all the cases hold that, in such a case, it requires some declaration of such an intention in the deed to sustain such an inference. There is no reason for presuming a different intention in a case like the present. The grantor, Mumford, intended this as a street, and gave it the name of Erie Street, and, as regards his grantees in these deeds, he dedicated it as a street, according to all the cases, whether the public ever accepted it as such or not. It was, as between him and his grantees, a street which they had a right to use as such, as soon as these conveyances were made by him. 1 Wend. 262, 427; 2 Id. 472; 8 Id. 85; 11 Id. 486; 17 Id. 650; 18 Id. 411; 19 Id. 128; 1 Hill, 189. As regards the public generally, I admit it does not become a public highway until there has been an acceptance, either by formal act of the public authorities, or by common user under such circumstances as show an intent to accept it. *Holdane* v. *The Trustees of the Village of Cold Spring*, 21 N. Y. 474. This does not, in any manner, as I can perceive, affect the matter as between this grantor and his grantees. As between them and him, his conveyances, *per se*, dedicated it to their use as a street. I do not see, then, how, as regards these grantees, Mumford can be allowed to say it is not a street.

This being so, the rule of construction which should be applied to his conveyances is the same as if it were a public street, as regards the public generally. If, as regards these grantees, it is a street, and if, in his conveyances, he intended it as a street, as all the cases hold he did, I am not able to see why the legal inference, as regards his conveyance, is not the same as if it were a public highway. There is no more reason to presume the intention in the grantor in such a case to withhold his interest in the road to the centre of it, after conveying all his right and title to the adjoining lands, than there would be were this to all intents and purposes a public street. The question in each case becomes one of presumed intention arising upon the conveyance itself; and I am not able to perceive how it is possible to deduce a different

intention in one case from that which, the law has settled, shall be inferred in the other. Did not Mumford when he caused these lots to be laid out on either side of this street, and this street designated, named, and put down on the map, and these lots numbered, and when he conveyed these lots to purchasers with a reference to this allotment and survey, intend that this should be a street, by the name of Erie Street? No one will pretend that he did not. Did he not, by selling these lots to purchasers with reference to this map and street, and conveying the lots to them on both sides of the street, thereby, so far as these grantees are concerned, dedicate this as a street? No one can claim to the contrary. All the cases affirm it. Did he not, then, in making these conveyances to these purchasers, intend to convey lands upon a street, so far as the grantees in these deeds are concerned, and did not these purchasers so understand it? No one can doubt it for a moment. If such was the intention of the parties to these conveyances, then I am not able to perceive why the conveyance does not carry with it the usual legal inference that a conveyance bounded by a highway does, to wit, that it carries with it the fee to the centre of the road.

I certainly am not able to discover any more intention in the grantor to withhold, in these conveyances, his interest in the land covered by this street, than would be if the public authority had already laid out the street, and the grantor still held the fee subject to the easement. As between these parties, grantor and grantees, it is a public street to all intents and purposes, except that the public authorities are not bound to keep it in repair. It is made such by Mumford himself, in laying out the street and putting it upon his map, and selling these lots upon either side of it with reference to the map and street; and he has probably received the full value of the street in the increased price of the lots sold upon the street. 1 Hill. 190; 1 Sandf. 323, 346, 347; 17 Mass. 415; 4 Cush. 332; 8 Wend. 99; 17 Id. 661; 6 Pet. U. S. 438. If the views above expressed are correct, it follows that we must hold that these conveyances by Mumford carried the fee to his grantees to the centre of this street, unless this court shall feel constrained, in deference to the authority of the New York city street cases, to come to a different conclusion.

I have looked carefully into these cases, of which there are ten in number, and may be found in our reports, as follows: 4 Cow. 542; 1 Wend. 262; 2 Id. 472; 8 Id. 85; 11 Id. 486; 17 Id. 650; 18 Id. 411; 19 Id. 128; and 1 Hill. 189.

It cannot be denied that these cases seem to assume that a different construction should be put upon such conveyances in city lots bounded by a projected street. It is proper to remark, however, in regard to these cases, that they all arose on applications to the Supreme Court to set aside or confirm, assessments of damages on opening streets; and the question as between grantor and grantees does not seem to have been much considered. The discussion seems principally to have gone upon the question whether the city should pay the full value of the lands on

the ground that there was no dedication, or whether they should pay merely a nominal sum on the ground that there was a dedication of the street; and the court sustained the latter view.

Three of these cases were removed by writ of error to the Court for the Correction of Errors. In the first of those cases, *Livingston* v. *The Mayor of New York*, 8 Wend. 85, the Supreme Court had only awarded nominal damages to Livingston, and he having brought error, the court affirmed the judgment of the Supreme Court. As the corporation had acquiesced in the judgment of the Supreme Court, the question whether Livingston, having parted with his title, was not entitled to any damages, was not before the court; and this case, therefore, so far as the court of dernier resort is concerned, decides nothing as regards the question of title between grantor and grantee.

In the second case, *Wyman* v. *The Mayor, &c., of New York*, 11 Wend. 486, the case came before the Court for the Correction of Errors precisely in the same manner, and the same question, and no other, was presented to that court; and the only question was, whether the grantor was entitled to more than nominal damages, and not whether he was entitled to that, for the city had acquiesced in the judgment of the Supreme Court, and they could not say, therefore, that the judgment for nominal damages should be reversed.

In the third case, which was that of *Champlin* v. *Laytin*, 18 Wend. 411, the question under consideration was in no respect adjudicated by the Court of Errors; and all that was decided in that case is perfectly consistent with the view that the grantee in such cases takes to the centre of the street.

There is another consideration which should be taken into account in considering whether these cases are to be regarded as controlling authority upon the question before us, and that is, the grantee was not a party to the proceedings, and did not have his day in court to contest the issue; and, besides, those cases were not adjudged in a plenary suit or action at law. The cases came before the court in a summary way, upon application to confirm, or set aside, the assessments, and ought not to be regarded as so high evidence of the law as judgments of the court pronounced after a full trial in an action according to the course of the common law. There is another, to my mind, very objectionable feature to these street cases, that is, they seem to have inculcated the idea that there was a different rule of construction to be applied in such cases to a deed of land in a city from what there is to such a deed in the country. Such a doctrine I affirm has no foundation in principle, and will not, I apprehend, find any favor with this court. These cases were most severely criticised by the distinguished counsel who argued for the defendant in *Hammond* v. *McLachlan*, 1 Sandf. 323; and the Superior Court held these cases were not controlling authorities in that court upon the question under consideration. The same was again held in *Herring* v. *Fisher*, 1 Sandf. 344, and in the case of *Stiles* v. *Curtis*, 4 Day, 328, the Supreme Court of Connecticut held, in a precisely sim-

tlar case to this, that the conveyance carried the fee to the centre of the street. It seems to me, in view of these considerations, that this court cannot be considered as constrained by anything said in these New York street cases from fully considering the question presented, upon its merits, and deciding it according to the real intent of the parties; and it seems to me that, for the reasons above, as well as for the reasons stated by Judge Oakley in *Hammond* v. *McLachlan*, that the judgment of the Supreme Court should be reversed and a new trial granted.

Denio, Davies, James, and Hoyt, JJ., concurred; Selden, J., expressed no opinion; Comstock, C. J., and Lott, J., did not sit in the case. *Judgment reversed, and new trial ordered.*[1]

WHITE *v.* GODFREY.

Supreme Judicial Court of Massachusetts. 1867.

(*Reported* 97 *Mass.* 472.)

Tort for cutting off limbs of an elm tree on Summer Street in Taunton.[2]

At the trial in the Superior Court, before *Morton*, J., it appeared that the plaintiff acquired a lot of land on that street, by a deed in which the description was as follows: "A certain tract of land situate at the Neck of Land, so called, in said Taunton, on the northerly side of Summer Street, bounded and described as follows: beginning at a point on the line of Samuel Blake's land; thence by said street north fifty-eight and three quarters degrees west, about one hundred feet, to a stake and stones at the corner of Job Godfrey's land; thence north thirty-one and a quarter degrees east, to the river; thence by said Blake's land to the first mentioned bound." By other deeds introduced in evidence, it appeared that the plaintiff's grantor owned the fee to the centre of the street.

The defendant asked the judge to rule that the plaintiff did not own the fee to the centre of the street; but the judge directed a verdict for the plaintiff, the parties agreeing upon the amount of damages, if the plaintiff was entitled to recover; and the defendant alleged exceptions.

E. H. Bennett, for the defendant.

J. H. Dean, for the plaintiff.

Foster, J. We entertain no doubt that the plaintiff owned the land to the centre of the street. By the doctrine now established, such is the presumption wherever a deed bounds an estate by or on a public or private way, unless a contrary intent appears on the face of the instrument. *Boston* v. *Richardson*, 13 Allen, 146.

Exceptions overruled.[3]

[1] See *Matter of Lehigh St.*, 81 Pa. 85, but cf. *English* v. *Brennan*, 60 N. Y. 609.

[2] Part only of the case is given.

[3] See *Marsh* v. *Leet*, 34 Vt. 289; *Cobb* v. *Young*, 59 Me. 103; *Peck* v. *Bennett*, 141 Mass. 17; *Dean* v. *Leavitt*, 133 Mass. 55.

WHITE'S BANK OF BUFFALO *v.* NICHOLS.

COURT OF APPEALS OF NEW YORK. 1876.

[*Reported* 64 *N. Y.* 65.]

THESE are cross appeals from a judgment of the General Term of the Supreme Court in the Fourth Judicial Department, modifying, and affirming as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This was an action of ejectment. In the year 1834 George R. Babcock and Heman B. Potter were the owners of block number thirty-one, in the city of Buffalo. In that year they made a map of this block, dividing it up into lots, and designating Garden Street, extending from Carolina Street to Virginia Street, sixty-three feet wide. After the making of this map, and with reference to it, they sold and conveyed, by warranty deeds, all those portions of said block bordering on Garden Street as so laid. They conveyed to Philander W. Sawin, July 22, 1835, lot number five on said copy of map, described in the deed as follows: "Beginning on the north-westerly line of Carolina Street at its intersection with the north-easterly line of Garden Street; thence north-westerly along the north-easterly line of said Garden Street to a part of said block heretofore conveyed by the said Heman B. Potter and his wife and George R. Babcock to one Jacob T. Merritt; thence north-easterly bounding on said Merritt's land to the north-easterly line of said block; thence south-easterly along the line of said block to the State line; thence southerly along the State line to Carolina Street, and thence south-westerly bounding on Carolina Street to the place of beginning, containing more or less."

By quit-claim deeds executed in 1853 they conveyed to one John A. Campbell their interest in Garden Street, and the interest acquired by Campbell under those deeds has vested in the plaintiff.

Defendant acquired the interest in said premises conveyed to Sawin, and enclosed his lot with the fence on the easterly line of Garden Street, being on the easterly line of said street, as a street sixty-three feet wide, as located on said map. The other owners of property on both sides of Garden Street through to Virginia Street also enclosed their lots, placing fences on the east and west sides of Garden Street, as sixty-three feet wide, and said street so remained until 1869.

In February, 1869, the common council of the city of Buffalo ordered the lines of Garden Street to be staked out, and the boundaries recorded, and this was done, the boundaries being the same as shown by the map. In July, 1869, a petition was presented to the common council signed by landowners fronting upon the street, asking that Garden Street be contracted to the width of twenty-three feet. In accordance with this petition, and pursuant to the city charter, a reso-

lution was duly passed in August, 1869, directing such contraction, and the record of the street accordingly, which contraction and record were made accordingly. In May, 1873, the defendant enclosed with a substantial fence, and took actual and exclusive possession of the premises between the old and the new line of Garden Street, which are the premises described in the complaint.

The Special Term gave judgment adjudging that defendant deliver up possession of the premises, "and that the plaintiff have possession thereof."

The General Term modified the judgment by adding after the words above quoted the following: "Subject to an easement of defendant therein, of passage to and from Garden Street over said premises."

James J. Allen, for the appellant.

Sherman S. Rogers, for the respondent.

ALLEN, J. Both plaintiff and defendant appeal from the judgment of the Supreme Court in this action, each claiming to be entitled to the exclusive possession and beneficial enjoyment of the premises in dispute. The court below adjudged the plaintiff to be the owner in fee, and the defendant to be entitled to an easement in the premises, substantially destructive of the value of the proprietary right of the plaintiff.

Both parties derive title from a common source, that of the defendant being prior in point of time to that under which the plaintiff claims. The controversy hinges upon the construction and effect of the grant of the original proprietors of the premises owned by the defendant, and the extent and limits of that grant. The original proprietors being the owners of a large tract in the city of Buffalo, of which the premises in dispute, as well as those confessedly owned by the defendant, were a part, subdivided the same into lots, making a map thereof upon which was designated a street called Garden Street, sixty-three feet in width, and conveyed the several lots or parcels to different grantees with reference to the map. The premises of the defendant were conveyed to one Sawin, and bounded upon Garden Street on the west, and the defendant, as the grantee of Sawin, claims that the grant carried the fee to the centre of the street, subject to an easement in favor of the grantees of other portions of the tract and the public, in the street as laid down upon the map, and that the width of the street having been reduced by twenty feet upon each side, he is the owner of that twenty feet divested of the easement.

Whether a grant of lands bounded by a street, highway or running stream, extends to the centre of such street, highway or stream, or is limited to the exterior line or margin of the same, depends upon the intent of the parties to the grant as manifested by its terms, so that the question as to the true boundary is, in all cases, one of interpretation of the deed or grant.

Learned judges have contended, and in some of the States it has been substantially held, that in such cases the question of boundary is

rather one to be determined by reasons of public policy than by the intent, determined by the ordinary rules of construction, although in no instance is it claimed that a grantor may not restrict his grant so as to exclude the soil of the street, highway or stream; the most that is claimed by any is that nothing short of an intention, expressed *in ipsis verbis*, to exclude the soil in such cases should exclude it.

The rule, however, in this State is well settled, that no particular words or form of expression is necessary to restrict the grant to the exterior line of a street or margin of a stream, and exclude the soil of each; but that while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the lines of the street or under the water, such presumption may be overcome by the use of any terms in describing the premises granted, which clearly indicate an intent not to convey the soil of the street or stream. It is not sufficient to exclude from the operation of the grant the soil of a highway, *usque ad medium filum*, that the grant is made with reference to a plan annexed, the measuring or coloring of which would exclude it, or by lines and measurements which would only bring the premises to the exterior line of the highway, or that they are bounded generally by the line of the highway or along the highway, or by any similar expressions.

Although the highway is in one sense a monument, it is regarded as a line, and the centre of the highway in such case is regarded as the true boundary indicated, as is the case when a tree, stone or other similar object is designated as a monument; the centre, in the absence of any other indication, is regarded as giving the true boundary or limit of the grant. *Berridge* v. *Ward*, 10 C. B. N. S. 400; *Wallace* v. *Fee*, 50 N. Y. 694; *Perrin* v. *N. Y. C. R. R. Co.*, 36 Id. 120; *Bissell* v. *The Same*, 23 Id. 61; *Banks* v. *Ogden*, 2 Wall. 57. But when the words clearly indicate an intention to exclude from the operation of the grant the soil of the highway, it is equally well settled that it does not pass, and the grantor retains the title, subject only to any easement which may exist in the public or in the grantee of the adjacent lands. *Marquis of Salisbury* v. *G. N. Railway Co.*, 5 C. B. N. S. 174; *Jackson* v. *Hathaway*, 15 J. R. 447; *Smith* v. *Slocomb*, 9 Gray, 36; *Hoboken Land Co.* v. *Kerrigan*, 30 N. J. Law Rep. 16. The grant under which the defendant claims title, describes the granted premises as commencing at the intersection of the exterior lines of two streets, of which Garden Street is one, and so as necessarily to exclude the soil of the street. The point thus established is as controlling as any monument would have been, and must control the other parts of the description; all the lines of the granted premises must conform to the starting point thus designated, so that while but for this designation of the commencement of the survey or boundary, the lines along Garden Street and Carolina Street might, within the general principles before referred to, be carried to the centre of those streets respectively, they are necessarily confined to the exterior lines of the streets, so as to

connect at this starting point. The precise point was decided by this court. *English* v. *Brennan*, 60 N. Y. Mem. 609.

The defendant therefore acquired, and has, no title to the soil of the street, but the fee is in the plaintiff, and although the acquisition may be entirely barren and the recovery in this action be entirely fruitless, he is entitled to a judgment for the fee of the land subject to any easement which the defendant may have in the same.

The claim of the defendant, which has something of plausibility and equity to sustain it, that upon the assumption that by the grant to Sawin the soil of the street was excluded, yet the exterior lines of Garden Street being changed, the centre remaining the same, his boundary line necessarily changed so as to conform to the reduced width of the street and preserve his frontage upon it, cannot be sustained. The lines of his grant are fixed and permanent, and were established in reference to the circumstances as they then existed, and cannot be changed to conform to any altered condition, or circumstances, in the absence of any evidence in the grant that the parties contemplated a shifting boundary or any change in the lines or increase of the area of the lot granted, or to provide for any change in the line or width of the street as the same should be adopted or used by the public. Grants are always to be interpreted in reference to monuments and circumstances existing at the time, and cannot be extended so as to include other lands by implication or by conjecture that possibly had the parties foreseen changes in matters affecting the grant, they might have made it in other or different terms. *Falls Village Water-power Co.* v. *Tibbetts*, 31 Conn. 165; *Weisbrod* v. *C. and N. W. R. R. Co.*, 18 Wis. 35; *Banks* v. *Ogden*, *supra*; *Tibbetts* v. *Estes*, 52 Me. 566; *Kirkham* v. *Sharp*, 1 Whart. 323; *Cook* v. *McClure*, 58 N. Y. 437. The defendant acquired no title either vested or contingent, in any part of the street as designated on the map, in reference to which his lot was granted by the original proprietors.

[The court then considered the question of easement, and approved the modification of the judgment made by the General Term.]

As both parties fail in their appeal, the affirmance should be without costs to either party, as against the other, in this court.

All concur. *Judgment affirmed.*

KING'S COUNTY FIRE INSURANCE CO. *v.* STEVENS.

COURT OF APPEALS OF NEW YORK. 1882.

[*Reported* 87 N. Y. 287.]

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made December 6, 1880, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendant from tearing down a fence erected by plaintiff upon land forming part of what was once the southerly half of "the Wallabout bridge road," so called, in the city of Brooklyn, to which plaintiff claimed title.

The premises of both the plaintiff and defendant front on said Wallabout road, as the same existed in the year 1835: at this date the premises formed a part of a tract of land owned by one Garrett Nostrand, and were by him conveyed to Edward Sanford, who is the common source of title as to both parties to the action. The conveyance to Sanford described the premises as follows: "Beginning at a point on the southerly side of the Wallabout bridge road adjoining the land now or lately belonging to John Skillman," &c., &c.; "thence along Henry Boerum's and John Rapelyea's land north, —— minutes east, six hundred and sixty-three feet to land belonging to the heirs of Jacobus Lott; thence along said land forty-one degrees forty-five minutes west, fifty feet; thence along said land north, forty-eight degrees and nine minutes west, five hundred and ninety-four feet to the Wallabout bridge road; thence north, seventy-six degrees and forty-three minutes west, along said road, one thousand two hundred and twenty feet to the place of beginning; containing seventy-four acres, one rood and twenty-eight perches of land." The farm, after it was conveyed to Sanford, was laid out by him into city lots, including the lots now owned by both plaintiff and defendant; the conveyance under which the plaintiff derives title was prior in point of time to that of defendant. The Wallabout bridge road was discontinued, and plaintiff fenced in front of his lot to the centre of said road. Defendant tore down the fence, claiming a right of way.

N. Cothren, for appellant.

Jesse Johnson, for respondent.

ANDREWS, C. J. The title of the plaintiff to the southerly half of what was formerly the Wallabout bridge road, on which the plaintiff's premises abutted, depends upon the construction of the deed from Garrett Nostrand to Edward Sanford, dated January 20, 1835. Sanford is the common source of title to the premises of both parties. The defendant's lot also abutted on the Wallabout road, until its discontinuance, long after the conveyance of the respective lots, by Sanford. If Sanford acquired title to the southerly half of the road, under his conveyance from Nostrand, the plaintiff, as his grantee, acquired his title to the part, in front of its premises. Upon the assumption that the plaintiff acquired title to that part of the road, the right of the plaintiff to relief in this action, by injunction, would depend upon questions, not now necessary to be considered. If, however, the title to the southerly half of the road did not vest in Sanford, under his deed from Nostrand, then the action cannot be maintained. The fence torn down by the defendant, was built by the plaintiff, across the southerly half of the road-bed of the Wallabout road, which before that time was unenclosed, and over which the defendant was accustomed to pass, in

going to and from her premises. The obstruction was removed immediately after it was erected, and there was no such prior possession by the plaintiff as would, in the absence of legal title, constitute the defendant, a trespasser, in entering upon the land and removing the fence. We come then to the question, whether Sanford acquired title to the road-bed under his deed from Nostrand. That deed purports to convey about seventy-four acres of land lying south of the Wallabout bridge road, described as, "Beginning at a point on the southerly side of the Wallabout bridge road, adjoining the land now or lately belonging to John Skillman," and after running certain courses and distances, the line ran along the land of one Jacobus Lott, "north, forty-eight degrees and nine minutes west, five hundred and ninety-four feet to the Wallabout bridge road," and from thence "along said road, twelve hundred and twenty feet to the place of beginning."

There is but little diversity in respect to the general principles governing the construction of grants of land on a highway, but there is much contrariety of decision in the several States, in respect to their application, in particular cases, and in the construction of particular language, as bearing upon the point, whether the highway is, by the descriptive language of the conveyance, included in, or excluded from, the grant. It is generally conceded, that a grantor of land abutting on a highway may reserve the highway from his grant. But the presumption in every case is, that the grantor did not intend to retain the highway, and such reservation will not be adjudged, except when it clearly appears, from the language of the conveyance, that such reservation was intended. But what language will be sufficient to exhibit such intent, is the point of difficulty, upon which courts have differed. It was settled in this State, in *Child* v. *Starr*, 4 Hill, 369, that a boundary in a deed, "along the shore" of a fresh-water river, carried the grantee only to low water mark, and that the bed of the river did not pass under the conveyance. So a boundary by the *bank* of a creek, has been held to confine the grantee to the margin of the stream. *Halsey* v. *McCormick*, 13 N. Y. 296. In *The Seneca Nation*, &c. v. *Knight*, 23 N. Y. 498, the boundary was described as "beginning at a post on the *north* bank" of the Cattaraugus Creek, and thence ran, by various courses and distances, to a post on the *north* bank of the creek, "thence down the same, and along the several meanders thereof, to the place of beginning," and it was held that the grant included the bed of the stream, to the centre. The court approved the remark of Chancellor Walworth, in *Child* v. *Starr*, that monuments in such cases are only referred to, as giving the directions of the lines to the river, or stream, and not as restricting the boundary on the river. The court also remarked, that in a case of a boundary on a river, monuments are never located, in fact or in description, in the channel of a river, and that monuments were necessary, in order to mark the places of intersection with the stream. There is a close analogy between conveyances bounded by fresh-water streams, and by

highways, in respect to the point of construction of descriptive words. In the case before us, the starting-point of the description is on the southerly side of the Wallabout bridge road, and the exact point of beginning, is fixed by the reference to the lands of Skillman. The other lines are described by courses and distances, and the third course gives the length of that line in feet, to the road, which we think fairly imports, that the measurement is to the side of the road, and the fourth course is along the road, &c., to the place of beginning. We think the road-bed was excluded by the terms of the description, within the cases of *Jackson* v. *Hathaway*, 15 Johns. 447; *English* v. *Brennan*, 60 N. Y. 609; *White's Bank of Buffalo* v. *Nichols*, 64 Id. 65. In *Jackson* v. *Hathaway*, the description was "beginning at a certain stake by the side of the road called the old Claverack road, &c., from which stake running east, twenty degrees south, two chains to another stake; thence south, twenty-two degrees west, seventeen chains, sixty-four links; and thence" by specified courses and distances "to the first-mentioned bounds, making twelve acres, two roods and ten perches of land." It was held that the highway was not included. In *English* v. *Brennan* the court reached the same conclusion, where the description was: "Beginning at the southwesterly corner of Flushing and Clermont Avenues, running thence westerly along Flushing Avenue twenty-five feet, thence southerly at right angles to Flushing Avenue, seventy-nine feet nine inches to a point distant forty feet seven and a half inches westerly from the westerly side of Clermont Avenue, thence easterly on a line at right angles to Clermont Avenue, forty feet seven and a half inches, thence northerly, &c., to the point of beginning." In *White's Bank, &c.* v. *Nichols*, the reasoning of Allen, J., is much in point. He says: "The grant under which the defendant claims title, describes the granted premises as commencing at the intersection of the exterior lines of two streets, of which Garden Street is one, and so as necessarily to exclude the soil of the street. The point thus established is as controlling as any monument would have been, and must control the other parts of the description; all the lines of the granted premises must conform to the starting-point thus designated."

The cases of *Sibley* v. *Holden*, 10 Pick. 249; *Smith* v. *Slocomb*, 9 Gray, 36; and *Cottle* v. *Young*, 59 Me. 105, are also in point. In *Sibley* v. *Holden*, the description was: "Beginning at a stake and stones on the southerly side of a town road," &c., thence by courses and distances "to said road, thence by said road easterly to the place of beginning," and it was held that the road was excluded. In *Smith* v. *Slocomb*, where the description was very similar to that in *Sibley* v. *Holden*, Shaw, C. J., said: "But when it starts at the side of the road, and comes back to the road, and thence on the line of the road to the point of beginning, the conclusion is inevitable, that the road is excluded." The words *to* and *along* the road, in the description now in question, if not controlled by the starting-point, would, by well-settled construction, carry the boundary to the centre; but it is to be observed that

these words are not inconsistent with confining the boundary to the side of the road. It was held in *Dunham* v. *Williams*, 37 N. Y. 251, that a deed bounded on a highway, is satisfied by title extending to the side of the road, when the title to the road-bed was not in the grantor, and according to the principle of that case, the absence of such title, where the description runs *to* and *along* a highway, would not constitute a breach of the covenant of seisin. In this case no reason appears, why Nostrand should desire to retain title to the land in the Wallabout road. The Wallabout Bridge Road Company was a corporation created by special charter, by chapter 86 of the Laws of 1805, with authority to take land for its road, by private grant, or compulsorily, on paying the damages assessed, in which case the Act declares the company and their successors and assigns forever, shall have and hold "the lands and tenements occupied by the said road." The side of the road may have been made the boundary of the land conveyed, upon the mistaken supposition that the company had acquired, by the proceedings for condemnation, the absolute title to the land taken, or some other reason may have existed for restricting the grant. But we have no guide in ascertaining the intention of the parties to the conveyance, outside of the language of the deed; and upon this language, as interpreted by the courts of this State, in analogous cases, we think the southerly side, and not the centre of the Wallabout road, is the boundary.

These views lead to an affirmance of the judgment.

All concur.

Judgment affirmed.

DODD *v.* WITT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[*Reported* 139 *Mass.* 63.]

WRIT of entry to recover a parcel of land in North Adams. Plea, *Nul disseisin*. Trial in the Superior Court, before *Gardner*, J., who directed a verdict for the demandant, and reported the case for the determination of this court. The facts appear in the opinion.

S. P. Thayer, for the tenants.

M. E. Couch, (*C. J. Parkhurst* with him,) for the demandant.

FIELD, J. The demanded premises are a strip two rods wide on the westerly end of the lot described in the demandant's deed. The demandant derives title from Reuben Whitman, who in May, 1866, conveyed the premises to Thomas H. Lidford by a description as follows: "Commencing on the road at the southeast corner of the land that I gave D. H. Raymond a bond to convey; thence west twenty-two degrees thirty minutes north ten rods; thence south twenty two degrees thirty minutes west four rods; thence east twenty two degrees thirty minutes south ten rods; thence south on the road to the place of

beginning." The descriptions in the mesne conveyances are substantially the same. The road was four rods wide, and Reuben Whitman when he executed his deed owned the fee of it. The deed therefore conveyed the land to the centre line of the highway. *Peck* v. *Denniston*, 121 Mass. 17; *O'Connell* v. *Bryant*, 121 Mass. 557.

The tenants contended, that by the construction of the deed, the side lines of the demanded premises extended ten rods from the centre line of the highway, or eight rods from the westerly side of the highway; or, if this were not the true construction, that there was an ambiguity in the description; and they offered "John Lidford, father of said Thomas H. Lidford, as a witness to prove that at the time of the execution of the above mentioned deed from Reuben Whitman to Thomas H. Lidford, the said witness was present; — and that said Whitman measured on the west line of the road above mentioned westerly eight rods, and fixed a monument at the northwest corner of the lot; thence southerly four rods to the southwest corner, and fixed a monument; thence southerly eight rods to the west side of the highway; thence on the highway to the place of beginning; — that his son Thomas H. Lidford and himself built a fence across the west end of said lot from corner to corner, as indicated by the monuments thus erected, at the time of said deed to Lidford, which fence remained until after the demandant went into possession under his deed; — that the land included within said measurement was all that Thomas H. Lidford purchased as he understood it at the time, except that he was told by Whitman that his grant really extended to the centre of the highway, which he was told was four rods wide." The court excluded this testimony and ruled "that there was no ambiguity in the deeds offered by the plaintiff; that the monument called for 'on the road' was by the side of the road, and not the centre of the road;" and directed the jury to render a verdict for the demandant. This is a ruling that, by the construction of the deed, the lines extended ten rods from the westerly side of the road.

In *Peck* v. *Denniston*, *ubi supra*, Chief Justice Gray says: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the centre of the way, if owned by the grantor, and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction. *Newhall* v. *Ireson*, 8 Cu h. 595; *Fisher* v. *Smith*, 9 Gray, 441; *Boston* v. *Richardson*, 13 Allen, 146; *White* v. *Godfrey*, 97 Mass. 472; *Motley* v. *Sargent*, 119 Mass. 231."

Not one of these cases, however, considers the construction to be given to a deed in which a highway is a point of departure for a measured line.

In *Newhall* v. *Ireson*, *ubi supra*, the line was "running northerly seven poles to the county road, and from thence upon the road twenty-two poles to the first-mentioned bound." The seven rods terminated

on the north at an old wall, which formerly constituted the southerly boundary of the road. The court held that the line ran to the centre of the road, although this was more than seven rods.

The rule is stated in *Motley* v. *Sargent*, *ubi supra*, as follows: "It is a general rule of construction that where there is a boundary upon a fixed monument which has width, as a way, stream, or wall, even if the measurements run only to the side of it, the title to the land conveyed passes to the line which would be indicated by the middle of the monument."

The rule is then well established when the road is the *terminus ad quem*, but there is little authority when it is the *terminus a quo*, and there is no monument at the other end of the line.

A majority of the court is of opinion, that it is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way; and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the centre line of the stream or way. The ruling of the court, in the construction of the deed, was therefore *prima facie* correct, as there was no monument to determine the other end of the line. But this presumption can be controlled by evidence that the parties at the time of the conveyance established monuments of the boundaries. Without determining whether, in this case, there can be said to be a latent ambiguity in the deed (see *Hoar* v. *Goulding*, 116 Mass. 132), or merely an indefiniteness in the description, we are of opinion that the acts of the parties contemporaneous with the delivery of the deed in fixing the monuments, and the subsequent fencing of the lot and the occupation in accordance therewith, are admissible in evidence upon the construction to be given to the deed. *Blaney* v. *Rice*, 20 Pick. 62; *Stewart* v. *Patrick*, 68 N. Y. 450; *Hamm* v. *San Francisco*, 17 Fed. Rep. 119.

New trial.

IN RE ROBBINS.

SUPREME COURT OF MINNESOTA.

[*Reported* 34 *Minn.* 99.]

DANIEL M. ROBBINS and the Northwestern Elevator Company, under Gen. St. 1878, c. 29, § 12, made application to the District Court for Ramsey County to vacate certain portions of Vandalia and Central Streets in "Hewitt's Out-Lots" in Ramsey County, and asked the court to adjudge the title to the streets vacated to be in the Northwestern Elevator Company.

On the hearing before *Brill*, J., it appeared that Vandalia Street is eighty feet wide and lies wholly within "Hewitt's Out-Lots," and that

Central Street is forty feet wide and forms the eastern boundary of "Hewitt's Out-Lots," the adjoining land being unplatted. The respondents, Alice Hewitt and others, the platters and original owners of "Hewitt's Out-Lots," opposed the application and asked that the title to the streets, if vacated, be adjudged to be in them. Judgment was directed and entered vacating the streets as prayed for, and adjudging the title to the portion of Vandalia Street vacated, and to the west twenty feet of the portion of Central Street vacated, to be in the Northwestern Elevator Company. The petitioners appeal from this judgment.

Cyrus J. Thompson, for appellants.

J. M. Gilman and *M. D. Munn*, for respondents.

VANDERBURGH, J. In the year 1880, a certain tract of land, described as the N. E. ¼ of section 32, township 29, range 23, in Ramsey County, was surveyed, laid out, and platted by the proprietor into village lots, under the name of "Hewitt's Out-Lots." The streets therein were laid out uniformly eighty feet in width, except Central Street in question, which was laid out on the easterly margin of the tract, and was only forty feet wide. The petition in this case embraced an application, among other things, to vacate a portion of Central Street. The petitioners have acquired, by grant from the original proprietor, certain lots embraced within the plat, and fronting that portion of Central Street proposed to be vacated. The land adjoining the street on the east is still unplatted, and is not owned by the respondents; and the proprietors thereof, of course, own no part of the fee of such street. The court granted the petition and vacated the street, but adjudged the petitioners to be entitled to the fee of the west twenty feet of Central Street opposite their lots, and that they were entitled to take to the centre line only of the street.

The question here presented is whether, where a street or alley is laid wholly on one's own land, and is located on the margin of his tract, so that he owns nothing beyond, (the adjoining proprietor having no interest in the fee of such street or alley,) the whole of the street opposite a lot designated as such in a deed, and bounded on the street, passes to a grantee of the original proprietor?

Where, by the terms of a deed, the land conveyed is bounded by a street or highway, the grantee takes presumptively *ad filum viæ* as the natural boundary line between opposite proprietors; the reason of the rule being that the adjoining owners are presumed to have originally furnished the land in equal proportions for the sole purpose of a highway. *Dunham* v. *Williams*, 37 N. Y. 251; *Stiles* v. *Curtis*, 4 Day, 328; Woolrych on Ways, *5. So a deed of lots conveyed as represented in a town plat, is presumed to include a grant of the soil to the centre of the street, and it passes as parcel of the land and not as an appurtenant. *Bissell* v. *New York Central R. Co.*, 23 N. Y. 61. This presumption, however, yields when a different intention is clearly manifested, or when the evidence shows there could be no foundation

for it, as where the grantor at the time owned no part of the street, the same being laid wholly on the land of another. *Dunham* v. *Williams*, *supra*; *King's Co. Ins. Co.* v. *Stevens*, 87 N. Y. 287, 293, 294; 3 Kent, Com. *434; *Champlin* v. *Pendleton*, 13 Conn. 23; *Watrous* v. *Southworth*, 5 Conn. 305; *Peck* v. *Smith*, 1 Conn. 103, 146.

In arriving at a proper construction of the effect of a deed granting lots bounded on a street, and the intention of the parties thereto in respect to the extent of the grant in the street, regard must be had to the situation of the lots and streets and the state of the title, as well as the language of the deed. "This is the recognized rule of interpretation, and it is a question of interpretation and intent." *Mott* v. *Mott*, 68 N. Y. 246, 253; *Bliss* v. *Johnson*, 73 N. Y. 529; *Webber* v. *Eastern R. Co.*, 2 Met. 147. Ordinarily the ownership of the soil of the street is of no practical use to the grantors of abutting lots, and accordingly there is usually no purpose to be served in the retention by them of narrow strips or gores of land between the land conveyed and that of other proprietors; while for many purposes such ownership is of special importance to the purchaser, because the owner of the fee of the highway is entitled to the proprietary and beneficial use thereof, subject only to the public easement, and may maintain trespass for an injury to, or the exclusive appropriation of the soil, or other acts done on the land not necessary to the enjoyment of the easement. *Peck* v. *Smith*, 1 Conn. 103, 145. It is presumed, therefore, that a grantor's land in a street passes under the general description in his deed of the adjoining land with which it is connected, or to which it belongs, as being part of the same tract, subject to the public easement. *Berridge* v. *Ward*, 10 C. B. N. S. 400; *Bissell* v. *New York Central R. Co.*, 23 N. Y. 61.

Applying these principles to an exceptional class of cases like the present, and we think it must follow that the entire street abutting the lots in question belonged to and passed with them under the general description in the deed of the original proprietor. *Taylor* v. *Armstrong*, 24 Ark. 102. It does not differ from the case of an alley laid off by the original proprietor from the rear portion of a tier of lots next adjoining an adjacent proprietor. Subsequent purchasers of lots take the whole alley as part of the grant, the original owner retaining no portion of the fee.

We have not overlooked the case of *Brisbine* v. *St. Paul & S. C. R. Co.*, 23 Minn. 114, 130. In that case the plaintiff owned land extending to low-water mark on the bank of the Mississippi River, in the city of St. Paul, subject to the easement of a public street laid out on the river margin thereof, and intervening between it and lots bounded thereon which he had sold, and it was held, in an action between him and the defendant corporation, which had appropriated a portion of the street and bed of the river adjoining, that the grantees took only to the centre of the street, leaving in him the fee of the other half, to which were attached valuable riparian rights, not common to the public,

including the use of the river, to the navigable portions of the stream, for wharves, piers, or other useful or necessary purposes in connection with the navigation on the river, together with the right of accretion. *Union Depot, &c., Co.* v. *Brunswick*, 31 Minn. 297. There was much reason, therefore, why, in the case referred to, the court should hesitate to hold that it was the intention of the parties that the title conveyed by plaintiff's previous deeds should not extend beyond the centre line of the street. But there is not the same reason for applying the rule in this case, where the grantors had no interests beyond the street, and where it may be presumed that the street was laid out for the benefit and accommodation of the abutting lots, and that upon the sale thereof it was included in the estimation of the value.

Judgment reversed, and cause remanded, with directions to enter judgment in accordance with this opinion.

CHAPTER V.

ESTATES CREATED.

SECTION I.

ESTATES IN FEE SIMPLE.

Litt. § 1. Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. *Quia feodum idem est quo hereditas, et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hereditas legitima, vel hereditas pura.* For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him forever; or by these words, To have and to hold to him and his assigns forever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

Co. Litt. 8 b. And it is to be observed, that every word of Littleton is worthy of observation. First (heirs) in the plural number; for if a man give land to a man and to his heir in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case his heir shall take nothing.[1] Also observable is this conjunctive (*et*). For if a man give lands to one, To have and to hold to him *or* his heirs, he hath but an estate for life, for the uncertainty.[2] . . . Here Littleton treateth of purchases by natural persons, and not of bodies politic or corporate; for if lands be given to a sole body politic or corporate (as to a bishop, parson, vicar, master of an hospital, &c.), there to give him an estate of inheritance in his politic or corporate capacity, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance; for as the heir

[1] See Harg., note *ad loc.*; Elphinstone, Decis., Rule 67, Obs.

[2] "As to the construction contended for, although it is supported by a *dictum* of Lord Coke's, it is a strictness not to be tolerated at the present day." *Per* Shaw, J., in *Webb* v. *Craigie*, 10 Mass. 185, 188 (1813).

doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. But it appeareth here by Littleton, that if a man at this day give lands to I. S. and his successors, this createth no fee simple in him; for Littleton speaking of natural persons saith that these words (his heirs) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors).

Co. Litt. 9 b, 10 a. And here it is to be observed (that I may speak once for all) that every period of our author in all his three books contains matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heirs*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implieth, that this rule extendeth not, —

First, to *last wills* and *testaments;* for thereby, as he himself after saith, an estate of inheritance may pass without these words (his heirs). As if a man devise twenty acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor, albeit it be not to the value of the land. So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or *in feodo simplici*, or to him and to his assigns forever. In these cases a fee simple doth pass by the intent of the devisor. But if the devise be to a man and his assigns without saying (forever), the devisee hath but an estate for life. If a man devise land to a man *et sanguino suo*, that is a fee simple; but if it be *semini suo*, it is an estate tail.

Secondly, that it extendeth not to a *fine sur conusans de droit come ceo que il ad de son done*, by which a fee also may pass without this word (heirs) in respect of the height of that fine, and that thereby is implied that there was a precedent gift in fee.

Thirdly, nor to *certain releases*, and that three manner of ways. First, when an estate of inheritance passeth and continueth; as if there be three coparceners or joint tenants, and one of them release to the other two, or to one of them generally without this word (heirs), by Littleton's own opinion they have a fee simple, as appeareth hereafter. 2. By release, when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, &c., release to the tenant of the land generally all his right, &c., hereby the seigniory, rent, &c., are extinguished forever, without these words (heirs). 3. When a bare right is released, as when the disseisee release to the disseisor all his right, he need not (saith our author in another place) speak of his heirs. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. A., seised of land, suffereth B. to recover the land against him by a common recovery, where the judgment is *quod predictus B. recuperet versus pred. A. tenementa predicta cum pertin.*; yet B. recovereth a fee simple without this word (heirs); for

regularly every recoverer recovereth a fee simple. 5. Nor to *a creation of nobility by writ*; for when a man is called to the Upper House of Parliament by writ, he is a baron, and hath inheritance therein without the word (heirs). . . .

But out of this rule of our author the law doth make divers exceptions (*et ex aptio probat regulam*); for sometime by a feoffment a fee simple shall pass without these words (his heirs). For example, first, if the father enfeoff the son, to have and to hold to him and to his heirs, and the son enfeoffeth the father as fully as the father enfeoffed him, by this the father hath a fee simple, *quia verba relata hoc maxime operantur per referentiam ut in esse videntur*. Secondly, in respect of the consideration, a fee simple had passed at the common law, without this word (heirs), and at this day an estate of inheritance [in] tail. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (heirs); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posterity. Thirdly, if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable, they have a fee simple without the word (successors); because in judgment of the law they never die. Fourthly, in case of a sole corporation a fee simple shall sometime pass without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him *in libera elemosina*, a fee simple doth pass without this word (successors). And so if a man give lands to the king by deed enrolled, a fee simple doth pass without these words (successors or heirs); because in judgment of law the king never dieth. Fifthly, in grants sometimes an inheritance shall pass without this word (heirs). As if partition be made between coparceners of lands in fee simple, and for owelty of partition the one grant a rent to the other generally, the grantee shall have a fee simple without this word (heirs); because the grantor hath a fee simple, in consideration whereof he granted the rent: *Ipsæ etenim leges capiunt ut jure regantur*. Sixthly, by the forest law if an assart be granted by the king at a justice seat (which may be done without charter) to another, *habendum et tenendum sibi in perpetuum*, he hath a fee simple without this word (heirs); for there is a special law of the forest, as there is a law martial for wars, and a marine law for the seas.

And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases, or confirmations that inure by way of enlargement of estates, warranties, bargain and sales by deed inrolled and enrolled, and the like, in which this word (heirs) is also necessary; for they do tantamount to a feoffment or grant, or stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus*. And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example;

for so our author himself in another place explaineth it, saying, "and memorandum, that in all other [such] like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law." And here our author is to be understood to speak of heirs when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit; but if a lease for life be made, the remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent. But where the remainder is limited to the right heirs of B., it need not be said, and to their heirs; for being plurally limited it includeth a fee simple, and yet it resteth but in one by purchase.

LEWIS *v.* REES.

CHANCERY. 1856.

[*Reported* 3 *K. & J.* 132.]

BY indentures of lease and release, dated 1778, being a settlement made subsequently to the marriage of John Lewis and Anne his wife, lands in the County of Caermarthen, and of which John Lewis was then seised in fee simple, were released and conveyed to Jones and Nicholas, their heirs and assigns, to such uses as John and Anne should jointly appoint; and in default of such appointment to the use of John for life, with remainder to the use of Anne for life; and from and after the determination of the said several estates for life, by forfeiture or otherwise, to the use of the said Jones and Nicholas, "*and their heirs and assigns*," in trust to preserve and support the contingent estate and estates, uses and remainders, thereinafter limited and created, from being defeated and destroyed; and for that purpose to make entries and bring actions, as occasion should require; but nevertheless to permit John and his assigns during his life, and Anne during her life, if she should survive him, to receive the rents and profits; and from and immediately after the decease of the survivor of John, and Anne his wife, to the use of William Lewis, his executors, administrators, and assigns for a term of one hundred years, upon the trusts thereinafter mentioned; and after the determination of the term of one hundred years, and without prejudice to the same, but subject thereto, to the use of Thomas Lewis, the son of John Lewis, and his assigns, for life; and from and immediately after the determination of that estate for life, by forfeiture or otherwise, to the use of the said Jones and Nicholas, and their heirs, in trust to preserve contingent remainders (*ut supra*), but

nevertheless to permit Thomas Lewis and his assigns, during his life, to receive the rents and profits; and from and immediately after the decease of Thomas Lewis, to the use of the first and other sons of the said Thomas Lewis, successively in tail, with remainders over; and it was thereby declared, that the term of one hundred years was limited to William Lewis, upon trust, by the ways and means therein expressed, to raise and levy, immediately after the decease of John Lewis and Anne his wife, the sum of £50 for the portion of Hester Lewis.

The indenture of release contained the usual powers for the several tenants for life to demise the premises for terms not exceeding twenty-one years.

In 1786, John Lewis died intestate, and leaving Thomas Lewis, his only son and heir-at-law; Anne Lewis died in 1792.

The power of appointment, limited by the settlement of 1778, was never exercised.

The £50, directed to be raised for the portion of Hester, was raised and paid. The term of one hundred years became attendant upon the inheritance, and was afterwards extinguished.

By indentures of lease and release, dated 1793, being the settlement made previously to the marriage of Thomas Lewis and Elizabeth his first wife, and by a recovery suffered in pursuance thereof, Thomas Lewis, in consideration of the marriage, and of a portion of £150 paid him by the father of Elizabeth, purported to settle the same estates to the use of himself for life, with remainder to Elizabeth for life, with remainder (subject to the terms for raising portions for younger children) to the first and other sons of the marriage successively in tail, with remainder to the daughters as tenants in common in tail, and if but one, then to such only daughter in tail, with remainder to his own right heirs.

There was issue of this marriage two children, John, who died in 1820, a bachelor, and a daughter, who died in 1843 intestate, and leaving the defendant her eldest son and heir-at-law.

Elizabeth died in 1798; and, in 1800, Thomas married a second wife, by whom he had one son, Henry, who died, leaving the plaintiff his heir-at-law.

In 1858, Thomas Lewis died, and, upon his death, the defendant entered into possession of the premises.

The bill charged, that the recovery suffered by Thomas was ineffectual to bar the remainders expectant upon his life estate, under the settlement of 1778. The prayer of the bill was for a declaration, that the plaintiff was entitled as tenant in tail in possession under the settlement of 1778; and for the usual consequential relief.

It appeared, that, in 1828, Thomas Lewis and Henry, then his eldest surviving son, joined in mortgaging the premises for a term of five hundred years to one Evans, to secure £140 and interest; and the mortgage contained a covenant by Thomas Lewis (which, however, was

never performed) to suffer a recovery "so as to bar the estate tail of the said Henry Lewis, and all remainders over, and enlarge the same estate tail into an estate in fee simple."

Mr. Willcock, Q. C., and *Mr. Renshaw*, for the plaintiff.

Mr. J. Hinde Palmer (in the absence of *Mr. Rolt*, Q. C.), for the defendant.

VICE-CHANCELLOR SIR W. PAGE WOOD. I have taken time to consider the question upon which I reserved judgment in this case, on account of the high authority cited by the defendant's counsel in support of his proposition, that, in construing a limitation like the one in question, the court will follow the same rule of construction whether the limitation be contained in a deed or in a will, and, in either case, will look at the whole instrument to see whether it be necessary, in order to carry into effect the intention of the parties, that more than an estate *pur autre vie* should pass; and, where no such necessity is apparent, will construe the limitation, whether in a deed or will, as restricted to such an estate.

The question has arisen less frequently than might have been expected, considering the frequency of the error. I say "error" because no one can doubt that the omission to add words restricting the limitation in question to an estate *pur autre vie* was an oversight.

The limitations in the settlement are these: — [His Honor read the limitations in the settlement of 1778, as stated above]: — and the question upon which I reserved judgment is, whether, in construing this deed, the court can read the first limitation to the trustees, "their heirs and assigns," upon trust to preserve contingent remainders, as if words were added restricting that limitation to the life of the survivor of the preceding tenants for life.

With regard to the authorities upon this question, I am not aware that they have at present gone beyond what I am about to state.

In *Venables* v. *Morris*, 7 T. R. 342, 438, Lord Kenyon, C. J., held, that, in that particular case, the trustees must be held to take the fee. In discussing that case, he assigns no reason for his decision; but in the subsequent case of *Doe* v. *Hicks*, 7 T. R. 433, 437, — a case in which the instrument in question was a will, — he says, he had come to that decision because "there" (meaning in *Venables* v. *Morris*) "it was absolutely necessary that the fee should be in the trustees," giving as the reason, that the tenant for life had a power of appointment, and if, in exercising that power, she had introduced any contingent remainders, they might all have been defeated if the uses were not executed in the trustees. Then he adds this other observation, — which was also relied upon in argument, as showing that a limitation like the present will be cut down, whether in a deed or in a will, unless it be shown to be necessary in order to effectuate the intention of the parties, — "on the same principle, therefore, that it was necessary in that case that the trustees should have the legal estate" (meaning the legal estate in fee), "to answer the intention of the parties, I think it is not

during the life of the tenant for life.

necessary in this case that they should take the legal estate for a longer term than during the lives of the tenants for lives, since this construction will best answer the intention of the testator."

In consequence of Lord Kenyon having made that statement as to the reasons for his decision in *Venables* v. *Morris*, and *Doe* v. *Hicks*, Sir William Grant, M. R., refers to the case of *Doe* v. *Hicks*, as supporting his judgment in *Curtis* v. *Price*, 12 Ves. 89, — where, as I shall presently show, and as he himself observed in his judgment, it was absolutely necessary to construe a limitation to trustees and their heirs as restricted to the life of a tenant for life; for that limitation being followed by another to the same trustees for a term of years, which, as he says, Id. 101, could not arise if the former carried the fee, in order to give effect to the term, it was absolutely necessary to restrict the limitation in fee. Referring, however, in his judgment in that case to *Doe* v. *Hicks*, he describes it as a case very much in point, the limitation to trustees having there, he says, been construed to operate only for the lives of the tenants for life, upon two grounds, first, that the object for which the estate was given did not require it to endure any longer, — the object being to preserve contingent remainders; and, secondly, that the intention must have been to limit the estate, at least the party must have understood himself to be limiting it, only during the lives of the several tenants for life, as he repeated the limitation each time that he limited estates for life; and then he adds this passage, to which I was referred by the counsel for the defence, as showing that there was no difference in this respect between the rules to be followed in the interpretation of deeds and wills, and that in both the fee will be cut down, unless shown to be necessary to the purposes of the deed: — "That," he says, "I admit, was the case of a will: a case, however, a short time before upon a deed is there cited, which gave Lord Kenyon occasion to state the ground upon which the former case was decided, more particularly than upon the argument of that case. The other case is *Venables* v. *Morris*, in which the court held that they could not read the deed as if the words, 'during the life of Hannah Morris' were inserted. But Lord Kenyon stated the ground of the difference to be, not that the one case was upon a will, the other upon a deed; but that in the one case the construction was necessary to give effect to the apparent intention, in the other it was not necessary."

Now, in *Doe* v. *Hicks*, the devise was simply "unto," not "to the use of," the trustees and their heirs; and, according to the rule stated by Parke, B., in *Barker* v. *Greenwood*, 4 M. & W. 429, as applicable at the present day to the case of wills, the trustees under such a devise would take only so much of the legal estate as the purposes of the trust required, — in other words, would take only an estate during the life of the preceding tenant for life, that being all that was requisite for the purposes of the trust to preserve contingent remainders.

When Lord Eldon had to consider this point in *Wykham* v. *Wykham*, 18 Ves. 395, he does not appear to have been satisfied with those obser-

vations of Lord Kenyon and Sir William Grant in reference to *Venables* v. *Morris*. He first adverts to the well known distinction which has at all times prevailed as to the construction of deeds and wills, and which I have always understood to be this, that, although in both cases the courts look to the intention of the parties, yet in construing a deed, unless there be in the deed some manifest contrariety or contradiction, rendering a different interpretation necessary in order to effectuate the intention of the parties, the courts are guided by the strict legal meaning of words; but, in the case of a will, the testator is supposed to have been *inops consilii*, and on that ground a greater latitude is allowed in the construction of legal terms. After adverting to that doctrine as to the construction of wills, Lord Eldon goes on to make the following remarks in reference to the observations in *Venables* v. *Morris* and *Curtis* v. *Price*: — "I observe, in *Venables* v. *Morris*, Lord Kenyon had a good deal of difficulty to say that those words 'to trustees and their heirs' would not create a fee; and accounts for it in a subsequent case" (meaning *Doe* v. *Hicks*), "not by expressing an opinion that the estate could not be abridged even in a deed; but thus, that, in that case, he thought it necessary, as the Master of the Rolls in a subsequent case" (meaning *Curtis* v. *Price*), "seems to consider it, that the trustees to preserve contingent remainders should have an estate in fee, on account of the power of appointment the wife had. If that observation is duly applied to that case, the question becomes very material, whether, on account of such a power, a limitation in a deed is to be construed to import less than it expresses: a question which I cannot represent as quite settled. If the ground upon which it is there represented to be necessary to consider the estate as an estate in fee can be supported upon looking to the cases, — which, perhaps, is not quite to be admitted, considering that there was, prior to that power, an estate tail actually vested in the wife herself, subsequent to the limitation to those trustees, by virtue of which estate she would have been entitled to call for a conveyance from the trustees, — it appears to me very difficult to maintain the point, that, *in a deed*, this doctrine of implication is to be so applied."

That passage from Lord Eldon's judgment certainly does seem to me a strong authority, in opposition to what was pressed upon me, that there is no difference in this respect between a deed and a will.

In *Curtis* v. *Price*, Sir William Grant, no doubt, took notice of the circumstance, that it was not necessary, for the purpose of the trust, that the trustees should take more than an estate *pur autre vie*; but there was also in that case, as I have already remarked, this most important circumstance, making it absolutely necessary that the fee should be cut down. There the limitation of the fee to the trustees was followed by a limitation to the same trustees for a term of years, a limitation which could not arise at all, if the trustees had the fee in them by virtue of the preceding limitation. The two limitations were inconsistent and incompatible. One or the other must fail. See *per* Alexander, C. B.,

in *Colmore* v. *Tyndall*, 2 Y. & J. 622. And that circumstance was expressly relied on by Sir William Grant in adopting the plaintiff's construction cutting down the fee. He says, after noticing the two limitations to the same trustees, "The intention not only would not be answered, but would be contradicted, unless the plaintiff's construction is put upon the general words of the limitation to the trustees." 12 Ves. 101. And in a precisely similar case, *Beaumont* v. *The Marquis of Salisbury*, 19 Beav. 198, Sir John Romilly, M. R., followed that decision.

Then, in *Colmore* v. *Tyndall*, 2 Y. & J. 605, there was not only the circumstance that the estate given to the trustees was larger than seemed essential to its purpose; but there also, as here, the settlor had repeated the limitation in fee to the trustees to preserve, — a repetition which was unnecessary if they took the fee on the first occasion. But Alexander, C. B., said, that those circumstances, whether taken separately or even united, did not convey to his mind distinct evidence that it was the intention of the parties to the deed, that the trustees should take merely estates *pur autre vie*, and would not justify him in inserting words in order to diminish their estate. The second limitation to the trustees was not, he said, incompatible or inconsistent with the preceding one; and clearly it was not. All that could be said of it was, that it was a needless repetition, and that is all which can be said of the corresponding limitation here.

Following that authority and *Wykham* v. *Wykham*, I must hold that it is not sufficient ground for restricting the estate here limited to the trustees, "their heirs and assigns," to an estate *pur autre vie*, that the estate so limited seems larger than was essential to its purpose, or that the limitation has been unnecessarily repeated.

In this case, however, two additional circumstances were relied upon in argument as taking the case out of the authorities I have mentioned, viz. the circumstance of a term of one hundred years being limited to William Lewis subsequently to the limitation in fee to the trustees to preserve contingent remainders, and the power to grant leases reserved to the successive tenants for life.

With regard to the first of these, the term of one hundred years, it is not, as in *Curtis* v. *Price*, a term limited to the same trustees to whom the preceding limitation purports to pass the fee, but to a distinct person; and I cannot say that such a limitation is incapable of taking effect as an equitable term.

And, as to the second circumstance, the leasing power in the successive tenants for life, my impression is, as I intimated during the argument on the authority of *Isherwood* v. *Oldknow*, that estates created by virtue of those powers would override all the other limitations in the deed, such estates taking effect out of the estate from which the power is derived, and barring as limitations of the use in pursuance of the power. See *per* Bayley, J., in *Isherwood* v. *Oldknow*, 3 M. & Selw. 404, 406. And even if that were not the case, the same argument

would apply as that which disposes of the former objection as to the term in William Lewis, that such estates would be capable of taking effect as equitable terms.

It appears to me, therefore, that neither in the limitations which have been relied on by the defendant's counsel as grounds for cutting down the limitation in fee to the trustees, nor in any other part of the settlement, — and it is to the settlement alone that I can look in determining this question — is there anything indicative of an intention so incompatible or inconsistent with the fee being in the trustees, that it cannot take effect unless the fee be so restricted; and upon the authorities it is clear, that, unless such an intention be manifested by the deed, the court is not justified in putting such a construction upon a limitation like the present.

The only remaining points raised for the defence are those upon which I did not hear a reply, viz. as to the defendant's right to defeat the settlement of 1778 as being a voluntary settlement, and as to the Statute of Limitations.

As to the first, the defendant claims under what he alleges to be a conveyance for valuable consideration, executed by the heir of the settlor. But I have no conception that any such claim can be sustained. I have no conception that either an heir or a devisee can, by a conveyance for valuable consideration, set aside a settlement made by his ancestor or testator, however voluntary. The real truth is, as it was put by Lord Campbell in *Doe d. Norman* v. *Rusham* [17 Q. B. 723], that, in such a case, neither heir nor devisee ever had any estate to convey. The only ground for a contrary notion is that supposed to be found in *Burrel's Case*; and it is clear from Lord St. Leonards' statement of that case in the last edition of his "Vendors & Purchasers," that *Burrel's Case* was one of fraud; and the judges, by deciding otherwise than they did, would have given effect to a fraudulent combination between the ancestor and heir to defeat the purchaser.

As to the Statute of Limitations, it is clear that the Statute would not bar until twenty years from the death of Thomas Lewis. For, here, independently of the consideration, that, Thomas Lewis being tenant for life under both instruments — the settlement of 1778 and that of 1793 — his possession would be referred to the former, even if he had done no act in recognition of that instrument, I have the additional circumstance that the settlement of 1778 has been expressly recognized by Thomas Lewis. In 1828, Thomas Lewis actually dealt with this property as tenant for life under the settlement of 1778, executing a mortgage in that year with the concurrence of the son, through whom the plaintiff claims, and covenanting to suffer a recovery to bar this very entail.

It appears to me, therefore, that all the points raised for the defence have failed, and there must be a decree according to the prayer of the bill, with this addition only, that the plaintiff is entitled, "for an equi-

table estate." And, as to costs, the title which the defendant has attempted to set up was one acquired by tort, and it has failed; under these circumstances, the defendant must pay the costs of the suit.

Decree accordingly.[1]

NEWHALL *v.* WHEELER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1810.

[*Reported* 7 *Mass.* 189.]

THIS was a writ of *entry sur disseisin*, sued by the demandant to recover his seisin in fee simple of a parcel of land in Pepperell, against the tenant.

The action was tried upon the general issue at the sittings after November Term, 1808, before *Parker*, J., when a verdict was taken for the demandant, subject to the opinion of the court upon a question reserved by the judge.

From the judge's report it appears that both parties derive their title under Josiah Hunt, who, being seised in fee of the premises, conveyed the same to Joshua Simonds, who afterwards conveyed the same by deed, expressed to be for the consideration of fifty pounds, to Samuel Cumings, Leonard Whiting, and John Goss, the selectmen of Hollis, in the State of New Hampshire, to them and their successors in the said trust of selectmen for the time being, for the use, benefit, and behoof of the said Hunt, and after his decease, if any of the premises should remain, then to Hunt's heirs forever; to hold for the use aforesaid, at the discretion of the grantees, with a warranty against all persons claiming under Simonds, the grantor. Hunt remained in possession of the premises from the time of executing his conveyance to Simonds, until his death; and he devised the same, by a will duly executed to pass real estate, to his wife, Elizabeth Hunt, in fee simple, who on his death entered, claiming under that devise, and continued in possession until the premises were duly levied upon by an execution against her to satisfy the judgment creditor, whose estate in the same was legally conveyed to the demandant.

The heirs of Simonds were admitted to defend under the tenant.

If Josiah Hunt had a fee simple under Simonds's convey to Cumings and others, selectmen of Hollis, the verdict was to stand, and judgment to be rendered accordingly; otherwise a new trial was to be granted.

The cause was argued at the last October Term, in this county, and again at this term by *Lawrence*, for the demandant, and *Richardson* for the tenant.

The action was continued *nisi* for advisement, and at the following March Term in Suffolk, the opinion of the court was delivered as follows, by

[1] See *Cooper v. Eyre*, L. R. 7 Ch. 398 (1872), *arrest.*

PARSONS, C. J. (after reciting the substance of the report of the trial, and stating the question reserved). This cause has been very well argued on each side. The counsel for the tenant contends, that as the selectmen of Hollis were not a corporation to take in succession, and as the estate conveyed to them was for the use of Josiah Hunt, it vested in him by the Statute of Uses; but as the grantees took only a life estate, a life estate only vested in Hunt.

It is therefore necessary to determine what estate the selectmen of Hollis, the immediate grantees, took under Simonds's deed. If they took an estate for the use of Josiah Hunt and his heirs, they took only a life estate; for it is very clear that they are not a corporation. But if they took an estate in trust for Hunt and his heirs, then the legal estate of the trustees shall be commensurate with the equitable estate of the *cestui que trust*, which in this case is a fee simple.

Having no court to compel the specific performance of a trust, it is a general rule to consider estates conveyed in trust, as estates conveyed to use, if it be not repugnant to the manifest intent of the grantor. If it be, it is considered as a trust estate, and the trustee is answerable for damages, as on an implied *assumpsit* to the *cestui que trust* that he would execute the trust — a remedy certainly very inconvenient, frequently very inadequate, and resorted to from necessity, because no court is competent to compel a specific performance of the trust.

Now, what is the manifest intention of Simonds, in this conveyance to the selectmen? They are to hold the lands for the use of Josiah Hunt, but at their discretion. It could not therefore be an estate for the use of Hunt; for then the use being immediately executed, Hunt would hold the estate during his life, not subject to any control or discretion of the selectmen. Further, they are to hold for the use of Hunt, and if after his decease any estate should remain, it is to go to his heirs. Simonds therefore contemplated that the trustees were able to sell a part, if not the whole. He therefore could not mean that the legal and equitable interest in the estate should unite in Hunt.

For these reasons we are of opinion, that the selectmen, who were the immediate grantees, took the legal estate in trust for Josiah Hunt and his heirs. Whether they could lawfully convey any part of the estate under this deed by the terms of it, although it was clearly contemplated, is not now before us; as they in fact conveyed no part of the premises. As the estate of the grantees was in trust, it must be commensurate to the trust, and therefore was an estate in fee simple.

Josiah Hunt had then an equitable fee simple, which he might lawfully devise; and upon his death, his widow had under his will the same equitable estate, which the judgment creditor and his assigns may lawfully claim against her. And no person can set up the legal estate against the equitable estate, but the trustees, or some persons claiming under them.

But in this case, neither the tenant nor Simonds's heirs claim under the trustees; as to them, therefore, the equitable estate of Josiah Hunt,

his devisee, and her assigns, they having the actual possession, is sufficient to maintain this action. For the actual possession is *primâ facie* evidence of a legal seisin; and a stranger to the trust shall not be permitted to control this evidence, by proving the existence of the trust estate.

Let judgment therefore be entered on the verdict.

SECTION II.

ESTATES TAIL.

Co. Lit. 20 a, b. In gifts in tail these words (*heirs*) are as necessary, as in feoffments and grants; for seeing every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words (*heirs*), and that an estate in fee tail is but a cut or restrained fee, it followeth, that in gifts in a man's life-time no estate can be created without these words (*heirs*), unless it be in case of frankmarriage, as hereafter shall be showed. And where Littleton saith (*heirs*), yet (*heir*) in the singular number in a special case may create an estate tail, as appeareth by 39 Ass. p. 20, hereafter mentioned. And yet if a man give lands to A. *et hæredibus de corpore suo*, the remainder to B. *in formâ prædictâ*, this is a good estate tail to B. for that in *formâ prædictâ* do include the other. If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. *in formâ prædictâ*, this remainder is void for the uncertainty. But if the remainder had been, the remainder to C. *in eadem formâ*, this had been a good estate tail; for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man, *et semini suo* or *exitibus vel prolibus de corpore suo*, to a man, and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the Statute provideth, that *voluntas donatoris secundum formam in chartâ doni sui manifestè expressam de cætero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himself, as it appeared in his learned reading afore-mentioned upon this Statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitimè procreatis*, or *semini suo*, he hath but an estate for life, for that there wanteth words of inheritance.

These words [*of his body*] are not so strictly required but that they may be expressed by words that amount to as much: for the example that the Statute of W. 2 putteth hath not these words (*de corpore*) but these words (*hæredibus*) viz. *Cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis*. If lands be given to B. *et hæredibus quos idem B. de primâ uxore suâ legitimè procreaverit*, this is a good estate in especial tail (albeit he hath no wife

at that time) without these words (*de corpore*). So it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man *et hæredibus de carne sua*, or to a man *et hæredibus de se*. In all these cases these be good estates in tail, and yet these words *de corpore* are omitted.

Co. Lit. 26 b. John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain lands to Roberge and to the heirs of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Mawde the daughter was tenant in tail as heir of the body of her father, *per formam doni*, and the formedon which she brought supposed, "quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis de præfata Robergia per præfatum Johannem procreat' præfat' Matildæ filiæ prædict' Johannis de præfata Robergia per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict'." And yet in truth the land did not descend unto her from Robert, but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land, *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*.

DOE d. LITTLEDALE *v.* SMEDDLE.

KING'S BENCH. 1818.

[*Reported* 2 *B. & Ald.* 126.]

EJECTMENT, for certain premises situate in the parishes of Saint Bees and Saint Bridget, in the County of Cumberland, occupied by the defendants. At the trial at the last Cumberland Assizes, before *Bayley*, J., it appeared, that in the year 1776, Henry Littledale, being seised of the premises in question, in contemplation of marriage, made a settlement, by which he conveyed the premises to trustees, "in trust for the use of himself for life, then to the use of his wife for life, and then in trust for the use of his first son, and the heirs of such first son, *and from and immediately after the determination of that estate*, in trust for the use of his second, third, fourth, fifth, and all and every other son and sons, and their several and respective heirs, *and for default of such issue*, then to the use of all and every of his daughter and daughters, and their heirs, to take as tenants in common, and not as joint-

tenants, *and for want of such issue*, then in trust for the use of the right heirs of the survivor of himself and his wife forever." The issue of this marriage, were two daughters. Henry Littledale died in 1779, leaving his wife and daughters surviving him. In 1793 and 1794, both the daughters died unmarried. On the 30th May, 1781, the widow married Anthony Benn and had issue by him a son, Robert Benn, who is still living. She died on the 7th February, 1818. The question at the trial was, whether the premises belonged to the plaintiff, as heir at law of the two daughters, or to Mr. Robert Benn, the eldest son and heir of the widow. The learned judge thought, that the daughters, under the settlement, took an estate in fee which descended from them upon the lessor of the plaintiff, and directed a verdict accordingly; and now

Richardson (by leave of the learned judge) moved to enter a verdict for the defendants.

Abbott, C. J. The general rule of law is, that by the word "heirs" in a deed is meant heirs general, and even if it be admitted that there may be other expressions in the instrument, which from their nature may show that the intention of the parties was to use the word in a more limited sense, still it by no means follows that the court will adopt that limited sense, in those parts of the deed where the intention of the parties is not perfectly apparent. It may be admitted, in the present case, that the settlor, in the limitations to his first and other sons, used this word, as meaning heirs of the body. But if it were necessary, to form a judgment of what was his intention, when he used it in the limitation to his daughters, I should be of opinion, that it would be best effectuated by construing the expression as there meaning heirs general, and by holding that the daughters under it took estates in fee. It is, however, quite sufficient for the decision of this case, to say, that it is not plainly shown, that in this limitation, the word "heirs" is used in the confined sense of "heirs of the body." It follows, therefore, that the general rule of law must prevail, and that the word heirs must be taken in its larger meaning. Then if so, the daughters took in this case estates in fee; the consequence of which is, that the lessor of the plaintiff is entitled to recover, and that this verdict must stand.

Holroyd, J. Although it may be quite true, that the word heirs, in the respective limitations to the eldest and to the other sons, must in this deed, be construed to mean heirs of the body; yet it does not follow, that it must be so construed in the subsequent limitation to the daughters. For the word heirs is only to be construed contrary to its more usual sense, where that is necessary, in order to carry into effect the clear intention of the party using the expression. But where that is not necessary, there is no reason so to do, and the word must then be taken in its usual legal sense. Now, in the last limitation to the daughters, this necessity does not exist; and therefore the word heirs there must mean "heirs general." And if we were to hold, that it was to be construed as heirs of the body, great inconvenience would

follow. For, according to *Doe* v. *Worsley*, 1 East, 416, there would be no cross remainders, inasmuch as cross remainders cannot be raised by implication. Lord Kenyon there distinctly lays it down, "that with regard to deeds the rule is positively settled, that there can be no implication whatever in a deed;" and that case expressly decided the point. We should therefore counteract the probable intention of the settlor, if we were in this case to hold, that the daughters of Henry Littledale were under the settlement to take estates in tail. For in that case, supposing that five out of six had died, it might happen that five-sixths of the estate would go over to the heir of their mother by her second marriage, instead of the whole vesting in the sixth and surviving daughter. That would, I think, defeat the intention of the settlor, and it therefore seems to me not only that there is no necessity for restraining the meaning of the word heirs to heirs of the body, in order to carry his intention into effect; but that in all probability we should actually counteract it if we were so to decide. I think, therefore, that this rule ought to be refused.

Bayley, J. If there were a fair ground for doubt in this case, I should be of opinion that a rule to show cause should be granted; but in truth no fair doubt can be entertained. It is to be observed that this is a case arising not on a will, but on a deed, and the circumstance of these being limitations of uses makes no difference, for according to the judgment of Lord Holt in *Idle* v. *Cooke*, 2 Ld. Raym. 1144, limitations of uses must be construed according to the rules applicable to common law deeds. The word heirs may be used undoubtedly in the sense of heirs of the body, where the necessity of the case requires it. But where that necessity does not exist, there it must be taken to be used in its plain and natural sense, and to mean heirs general. Now, in the first limitation in this deed, the word is necessarily used in the restricted meaning, on account of the subsequent limitation to the second son. For the deed speaks of the determination of the estate of the eldest son, which could not happen if by the word heirs was meant heirs general, for there could be no failure of heirs general to the eldest son, whilst the second son remained alive. The same observations will apply to the limitation over to the second, third, and other sons. But in the limitation to the daughters there is not the same necessity to restrain the meaning of the word heirs. And if we were to do so, the inconvenience pointed out by my Brother Holroyd of the estate going over by parcels to the heir of the wife by her second marriage would be introduced, and in that case we should construe the word heirs contrary to the general rule of law, without knowing clearly whether, by so doing, we were carrying the intention of the settlor into effect. I think therefore that this verdict ought to stand.

Rule refused.[1]

[1] See *Wall* v. *Wright*, 1 Dr. & Walsh 1 (1837).

MORGAN *v.* MORGAN.

CHANCERY. 1870.

[*Reported L. R.* 10 *Eq.* 99.]

THE object of this suit was to recover possession of an estate called Penylan, sold by the father of the plaintiff to his uncle, the defendant, Rees Morgan the younger.

By a settlement of the 29th of November, 1791, made after the marriage of the great-grandfather of the plaintiff, the estate was conveyed to trustees and their heirs to the use of Rees Morgan, the settlor, for life, with remainder to the trustees, in order to secure an annuity to the wife of the settlor during her life in lieu of dower, and subject thereto to the use of David Morgan, the eldest son of the settlor, his heirs and assigns; but if he died without issue, then to Thomas Morgan, the second son, his heirs and assigns; and if both David Morgan and Thomas Morgan died without issue, then to the male issue of Rees Morgan, the settlor; and if there should be no male issue, then to his daughters.

David Morgan, the eldest son, died in 1815, intestate and without issue, and without having in any way dealt with the estate.

Thomas Morgan, the second son, died intestate in 1824, leaving David Morgan the younger, his only son, him surviving.

Rees Morgan, the settlor, survived his two eldest sons, and died in February, 1842, leaving Rees Morgan the younger, the defendant, his youngest son, and also the said David Morgan the younger, his grandson and heir-at-law, him surviving.

David Morgan the younger died in 1860, leaving the plaintiff, Thomas Morgan the younger, his only son and heir-at law and in tail, him surviving, who attained twenty-one in 1867, and in 1868 filed his bill against the defendant Rees Morgan the younger, and his mortgagees, claiming to be entitled to the estate.

The plaintiff's claim was contested by the defendants, who made out their title thus: —

In 1820, during the life of his father the settlor, Thomas Morgan the elder purported to convey the reversion in fee in the Penylan estate to D. L. Harries, his heirs and assigns, but did no act to bar an estate tail. In 1842, on the death of the settlor, Harries entered into possession of the property, and in September, 1847, sold and conveyed it to the defendant, Rees Morgan the younger. David Morgan the younger (the plaintiff's father) joined in this deed of conveyance, and thereby, after reciting that he had a claim to the property as heir at law of Thomas Morgan the elder, and that in order to avoid disputes the said Rees Morgan the younger had agreed to give him five pounds for joining in the conveyance, he purported in consideration thereof to grant, release,

and confirm the said Penylan estate to the said Rees Morgan the younger, his heirs and assigns forever. This deed was not enrolled, and no disentailing assurance was executed affecting the property.

In October, 1847, Rees Morgan the younger executed a mortgage of the estate, and the defendants Mary Thomas and Rachel Williams were the present mortgagees.

The principal questions in the case were: what estate David Morgan the elder and Thomas Morgan the elder took in Penylan, and whether the plaintiff's claim was barred by the Statute of Limitations (3 & 4 Will. 4, *c.* 27).[1]

Sir R. Baggallay, Q. C., and *Mr. Woodhouse*, for the plaintiff:

First: We contend that, on the proper construction of the deed of November, 1791, David Morgan the elder, and Thomas Morgan the elder, took equitable estates tail in the Penylan estate. The estate was conveyed, subject to the life interest of the settlor, to trustees to the use of David Morgan the elder, his heirs and assigns; but if he died without issue, then to the use of Thomas Morgan the elder, his heirs and assigns; and if both died without issue, then over.

This construction is in accordance with a *dictum* of Gould, J., in *Fisher* v. *Wigg*, 1 P. Wms. 14, 15: "A grant to a man and his heirs, but if he dies *sans* issue, &c., — this turns the fee in the premises to an estate tail, and corrects the generality of the preceding words." In *Bamfield* v. *Popham*, 1 P. Wms. 54, Powell, J., observed: "If a man does by deed give lands to A. without expressing any estate, and afterwards adds the words 'if A. die without issue, then to B.,' this makes an estate tail" (page 57). In *Idle* v. *Cook*, 1 P. Wms. 70, a surrender of copyholds to the use of Valentine and Alice for their lives, and their heirs and assigns, and for want of such issue to the right heirs of the surrenderor, was held to confer an estate in fee, and not an estate tail; but that case is not inconsistent with the *dictum* in *Fisher* v. *Wigg*, for the decision rested upon the words, "such issue;" and Holt, C. J., observed: "If it had been said, 'If Valentine and Alice die without issue of their bodies,' that, being express and particular, would have made it an estate tail" (page 78). On these authorities it is clear that each of the estates in remainder under the deed was an equitable estate tail. This being so, we contend that the plaintiff, the grandson and heir in tail of Thomas Morgan the elder, who survived his brother, and died in 1824, is now entitled to the estate.

Mr. Everitt, for the defendant Rees Morgan the younger.

Mr. Jessel, Q. C., and *Mr. Bevir*, for the mortgagees: —

The deed of 1791 did not create estates tail in David and Thomas Morgan, but operated as a gift to David in fee, with a contingent gift over to Thomas Morgan in fee in the event of his dying without issue, and a similar limitation in the event of both dying without issue, to the male issue of the settlor.

[1] Those parts of the arguments and opinion which relate to the Statute of Limitations are omitted.

The case of *Lile* v. *Cook* was a case on the surrender of copyholds, where the rules of construction are less strict than in cases of freeholds. But in that case the opposite construction to that contended for by the plaintiff was maintained, so that it is rather an authority in the defendant's favor. The case of *Fisher* v. *Wigg* turned on a tenancy in common, and the words relied on were only a *dictum* taken from the Year-Book (19 Hen. VI. 71). The plaintiff's counsel also rely on *Bamfield* v. *Popham*: but that case arose under a will, and the passage cited is not an authority for cutting down an estate in fee to an estate tail by ambiguous words.

April 21. Lord Romilly, M. R., after stating the facts of the case, continued: —

The first question is, what estate David Morgan the elder and Thomas Morgan the elder took in the Penylan property; and after considering the cases, and especially the case of *Fisher* v. *Wigg*, and the cases there cited, and notwithstanding the case of *Lile* v. *Cook*, which seems at first inconsistent with it, I am of opinion that David and Thomas Morgan each took an estate tail in the premises, and that unless they or one of them did some act to destroy the entail, it went to the issue of Thomas Morgan the elder, as tenant in tail general.

SECTION III.

ESTATES FOR LIFE.

Co. Lit. 42 a, b. If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quam diu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay x *l.* &c., or until the grantee be promoted to a benefice, or for any like uncertain time, which time, as Bracton saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall allege the lease, and conclude, that by force thereof he was seised generally for term of his life.

If a man make lease of a manor, that at the time of the lease made is worth xx *l. per annum*, to another until c *l.* be paid, in this case because the annual profits of the manor are uncertain, he hath an estate for life, if livery be made determinable upon the levying of the c *l.* But if a man grant a rent of xx *l. per annum* until c *l.* be paid, there he hath an estate for five years, for there it is certain, and depends upon no uncertainty. And yet in some cases a man shall have an uncertain

interest in lands or tenements, and yet neither an estate for life, for years, or at will. As if a man by his will in writing, devise his lands to his executors for payment of debts, and until his debts be paid; in this case the executors have but a chattel, and an uncertain interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattel, it shall go to the executors of executors for the payment of his debts: and so note a diversity between a devise and a conveyance at the common law in his lifetime. And tenant by statute merchant, by statute staple, and by *elegit*, have uncertain interests in lands or tenements, and yet they have but chattels, and no freehold, whose estates are created by divers Acts of Parliament, whereof more shall be said hereafter. And so have guardians in chivalry which hold over for single or double value uncertain interests, and yet but chattels.

If one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and express or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life. The same law is of a declaration of a use. A man may have an estate for term of life determinable at will: as if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for term of his life, this is determinable upon the determination of the office.

A. tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath been said an estate for a man's own life is higher than for the life of another. But if tenant in tail make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons.

First, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate tail be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.

Secondly, the law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple, but if tenant for life die, now is his wrongful estate in fee by judgment in law changed to a rightful estate for life.

ROSSE'S CASE.

QUEEN'S BENCH. 1598.

[*Reported* 5 *Co.* 13 *a.*]

BETWEEN Peter Rosse and Aldwick in an *Ejectione firmæ*, which began Pasch. 37 Eliz. Rot. 429, the case was such: a lease is made to A. and his assigns, *habendum* to him during his life, and the lives of B. and C.; and if this limitation during the life of B. and C. were void or not, was the question. And it was adjudged, that the limitation was good; for where it was objected that when a man hath two estates in him, the greater shall drown the less, and that an estate for his own life is higher than for the life of another: and therefore an estate for his own life, and for the lives of others, cannot stand together, — to *that* it was answered and resolved, that in the case at bar, the lessee had but one estate, which hath this limitation, *scil.* during his life, and the lives of two others, and he hath but one freehold, and therefore there cannot be any drowning of estates in the case, but he hath an estate of freehold to continue during these three lives, and the survivor of them.

BEESON *v.* BURTON.

COMMON PLEAS. 1852.

[*Reported* 12 *C. B.* 647.]

THE names of John Burton and twenty-eight other persons claiming under similar circumstances, appeared on the list of persons claiming to be entitled to vote in the election of any knight of the shire for the southern division of the county of Leicester, and were all duly objected to by the appellant.

The said John Burton appeared on the list of claimants, as follows: —

Name of voter	Place of abode	Nature of qualification	Street, &c., where the property is situate, &c
Burton, John	3 Hermitage	Freehold interest in building and land.	On road, T. Freeman's Common

John Burton is a resident freeman of the borough of Leicester, and possessed of an allotment of land under the provisions of a private Act of Parliament, 8 and 9 Vict. c. 6, intituled "An Act to repeal so much

of an Act for enclosing lands in or near the borough of Leicester, as relates to the regulation and management of the freemen's allotments, and to make other provisions in lieu thereof." By this Act, which was annexed to and formed part of the case, the resident freemen are empowered to elect from their own body a certain number of deputies to act for them in the regulation and general management of the freemen's allotments.

The 8th section empowers the deputies to take possession of the lands comprised in the first schedule of the Act (of which lands the allotment of the present claimant forms a part), and break up the whole or such parts thereof as to them shall seem expedient, and apportion and divide the same when so broken up into small allotments, not exceeding five hundred yards each, among the resident freemen desiring to become occupiers thereof, at an annual rent to be fixed at the discretion of the deputies, but not exceeding one farthing for every square yard, nor less than one shilling for every hundred yards; the allotments to be held respectively by each resident freeman desiring to become the occupier, and obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies.

By the 15th section, all the lands comprised in the two schedules of the Act, are vested absolutely in the deputies for the time being, in trust for the resident freemen.

By the 17th section, the deputies have power to dispose, by absolute sale, of all or any part of the allotment comprised in the first schedule of the Act, freed and discharged from all right, claim, and interest of the resident freemen, but, by the 22d section, no sale is to be effected under the powers of the Act, without the consent of the major part of the freemen assembled at a public meeting, to be convened and conducted in the manner directed by this section.

By the 32d section in case any freeman shall be in arrear of rent for his allotment, for the space of fourteen days, or shall not conform to the provisions of the Act, or the orders, rules, and regulations to be made by the deputies, the said deputies may re-enter such allotment, and by force evict and dispossess such freeman.

The claimant has erected buildings on the land allotted to him, which land and buildings are above the value of 40*s.* above all charges.

It was contended, on the part of the appellant, that the claimant had no freehold interest in his allotment; but the revising-barrister decided that he had, and inserted his name accordingly on the list of voters for the parish of St. Mary, Leicester.

The cases of Thomas Archer, and twenty-seven other persons whose claims depended on the same point, were consolidated with the principal case.

W. E. Cox, for the appellant.

G. Hayes, for the respondent.

JERVIS, C. J. It seems to me that the view taken by the revising-

barrister in this case was correct, and that his decision must be affirmed, — the claimant having a freehold interest which entitled him to vote. It was admitted by the appellant's counsel, that the possession of a freehold interest of an uncertain duration, would entitle the party to a vote: but it was insisted that the estate which each allottee under this Act has, is not an estate of an uncertain duration, within the rule laid down in Co. Lit. 42 a, because it was determinable by the deputies; and therefore that the case must be governed by that of *Davis*, app., *Waddington*, resp., 7 M. & G. 37; 8 Scott N. R. 807. But, upon looking at the 8th section of the 8 & 9 Vict. c. 6, I find that each allottee is to hold his allotment "so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies." This provision is sufficient *per se* to create a freehold interest. But it is said that the whole scope of the Act, and especially the power vested in the deputies, by § 17, to sell the land, with the consent of the major part of the freemen, shows that it was not intended to give the allottees a freehold. If this is not a freehold, what estate is it? It clearly is not an estate for years: nor is it an estate at the absolute and uncontrolled will of the lessors. It is suggested that it is a sort of parliamentary estate, floating between an estate of freehold and an estate at will. It would manifestly be very inconvenient so to hold; and I do not see how we can consistently with the rules of law hold this to be any other than an estate of freehold. It is plain, according to the case of *Davis*, app., *Waddington*, resp., that, if the deputies had the power at any moment to turn out the allottees, their estate would have been a mere estate at will, and would not have conferred a vote. But this is not an estate held at the uncontrolled will of the grantors, but at the will of strangers, or subject to the consent of the deputies and the majority of the freemen, of whom the allottee is one. The estate, therefore, is held upon an uncertain event, for, it is uncertain whether the majority will consent to a sale or exchange: and therefore the case falls within the definition of an estate for life in Co. Lit. 42 a. Consequently the claimant had a freehold interest, in respect of which he was entitled to be registered.

MAULE, J. I also am of opinion that the claimant in this case was rightly held by the revising-barrister to be entitled to a freehold interest in his allotment. It is well established that an estate which may last for a man's life is, ordinarily, a freehold. An estate for life, determinable on an event which is not in the power of the lord from whom it is held, is a freehold. An estate determinable on a condition, which condition cannot arise at the absolute will of the lord, is a freehold. Here, the duration of the estate depends upon the will of the tenant, which will not prevent its being an estate of freehold: but the estate is capable of being determined upon an event of a very special kind happening, — on the resolution of the deputies to sell or exchange the land, and the concurrence of the majority of the freemen. That is an event

which is not dependent on the will of the lord. There is not that arbitrary power of removal which will prevent the estate from being a freehold. It is as much out of the power of the lord to determine the estate, as if his concurrence were not necessary at all. His concurrence being necessary, does not make the concurrence of the others less independent of him. An estate which may last for the life of the grantor, though determinable under circumstances like those of this case, is clearly such an estate as according to the older authorities is an estate of freehold. The case of *Davis*, app., *Waddington*, resp., appears to have been well decided. The party claiming to vote there, was appointed by the trustees to be an inmate of the almshouses, so long as they should think fit to allow him to continue there. It was held, quite conformably with the general law, that that did not constitute a freehold interest: and it is equally clear that the interest the party in this case has *is* a freehold.

Williams, J. I am of the same opinion. This is clearly an estate of freehold, inasmuch as it is for an uncertain interest, which may last for the life of the party, and is not confined to the will of the grantors. It comes, therefore, within the examples given in some of the older cases.

Talfourd, J., concurred.

Decision affirmed, with costs.[1]

SECTION IV.

ESTATES FOR YEARS, FROM YEAR TO YEAR, AND AT WILL.

Lit. § 70. Also, if a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupy it at the will of him which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

Lit. § 740. But where such lease or grant is made to a man and to his heirs for term of years, in this case the heir of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattel real, and chattels reals by the common law shall come to the executors of the grantee, or of the lessee, and not to the heir.[2]

[1] See Serjeant Manning's note to *Davis* v. *Waddington*, 7 M. & G. 37, 45–49; *Fenwick* v. *Scott*, L. R. 7 C. P. 202; *Western Transp. Co. of Buffalo* v. *Lansing*, 49 N. Y. 499; *Warner* v. *Tanner*, 38 Ohio St. 118; *Gilmore* v. *Hamilton*, 83 Ind. 196.

[2] On the limitation of a term to one and the heirs of his body, see Fearne, C. R. 460–463.

Co. Litt. 45 b. Words to make a lease be, demise, grant, to farm let, betake; and whatsoever word amounteth to a grant may serve to make a lease. In the king's case this word *Committo* doth amount sometime to a grant, as when he saith *Commisimus W. de B. officium senescalsiæ*, &c., *quamdiu nobis placuerit*, and by that word also he may make a lease: and therefore *a fortiori* a common person by that word may do the same.

"*Of certain years.*" For regularly in every lease for years, the term must have a certain beginning and a certain end; and herewith agreeth Bracton, *terminus annorum certus debet esse et determinatus.* And Littleton is here to be understood, first, that the years must be certain when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an uncertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain it sufficeth. *Quia id certum est quod certum reddi potest.* For example of the first. If A., seised of lands in fee, grant to B. that when B. pays to A. xx. shillings, that from thenceforth he shall have and occupy the land for 21 years, and after B. pays the xx. shillings, this is a good lease for 21 years from thenceforth. For the second, if A. leaseth his land to B. for so many years as B. hath in the manor of Dale, and B. hath then a term in the manor of Dale for 10 years, this is a good lease by A. to B. of the land of A. for 10 years. If the parson of D. make a lease of his glebe for so many years as he shall be parson there, this cannot be made certain by any means, for nothing is more uncertain than the time of death, *Terminus vitæ est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis.* But if he make a lease for three years, and so from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, first for three years, and after that for three years; and for the residue uncertain.

If a man maketh a lease to I. S. for so many years as I. N. shall name, this at the beginning is uncertain; but when I. N. hath named the years, then it is a good lease for so many years.

A man maketh a lease for 21 years if I. S. live so long; this is a good lease for years, and yet is certain in uncertainty, for the life of I. S. is uncertain. See many excellent cases concerning this matter put in the said *Case of the Bishop of Bath and Wells*. By the ancient law of England, for many respects a man could not have made a lease above 40 years at the most, for then it was said that by long leases many were prejudiced, and many times men disinherited, but that ancient law is antiquated.

Co. Litt. 55 a. It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implieth it

to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the books that seem *prima facie* to differ, clearly reconciled. . . .

There is an express *ouster*, and implied *ouster*; an express, as when the lessor cometh upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as if the lessor without the consent of the lessee enter into the land and cut down a tree, this is a determination of the will; for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue. If a man leaseth a manor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will. The lessor may by actual entry into the ground determine his will in the absence of the lessee, but by words spoken from the ground the will is not determined until the lessee hath notice. No more than the discharge of a factor, attorney, or such like, in their absence, is sufficient in law until they have notice thereof.[1]

[1] 2 Bl. Com. 160, 161. "A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*: which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the Statute 13 Edw. I. *De Mercatoribus*, and thence called a statute merchant; the other pursuant to the Statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the Statute 23 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which directs such recognizances to be enrolled and certified into chancery. But these by the Statute of Frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

"Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the Third Part of these Commentaries. At present I need only mention that it is the name of a writ, founded on the Statute of Westm. 2 (13 Edw. I. c. 18), by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid: and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this

PARKER d. WALKER *v.* CONSTABLE.

KING'S BENCH. 1769.

[*Reported* 3 *Wils.* 25.]

In ejectment of lands in Dorking in Surrey.

Per WILMOT, C. J., and *totam curiam*. It has not been doubted of late years (and it was now resolved in this case), that half an year's notice to quit possession must be given to a tenant at will, before the end of which time an ejectment will not lie to turn him out of the farm. In a case of the demise of *Tasker* v. *Burr*, the same point was resolved by the court of B. R. and *per* Leigh, Serjeant, in Easter Term 6th or 7th Geo. 3, the same law was held in the case of an executor of a tenant at will. In the case at bar, the plaintiff having been non-suited for want of giving such half year's notice to defendant Constable, a tenant

is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the Statute of *Quia Emptores* (18 Edw. I.), it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the Statute, therefore, of Westm. 2, permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the Statute *De Mercatoribus* (13 Edw. I.), passed the same year, the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though one *half* of them was liable to be taken in execution for any other debt of the owner.

"I shall conclude what I had to remark of these estates by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke (1 Inst. 42, 43): 'These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freehold;' (which makes them an exception to the general rule) 'because though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*.' This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason, why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir, which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts if recovered would belong. For upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors (Co. Lit. 42); because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid."

See *Jennett* v. *Cook*, 1 Lev. 170.

at will, to quit the premises, moved to set aside the non-suit; and, on showing cause, the rule to set aside non-suit was discharged for the reason above.

RIGHT d. FLOWER *v.* DARBY.

KING'S BENCH. 1786.

[*Reported* 1 *T. R.* 159.]

EJECTMENT tried at the last assizes at Salisbury, before *Hotham*, Baron, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on the following case: —

That the lessor of the plaintiff was seised in fee of the premises in question. That on the 11th day of May, 1781, the defendant, Darby, took the premises, which are a house in Salisbury, and occupied them as a public-house from that time under a parol demise at £10 *per annum;* the rent to commence from Midsummer then next following. The defendant, Darby, let part of the premises to the defendant Bristow. That on the 26th March, 1785, the defendant Darby was served with a notice to quit on the 29th of September following.

The question is, Whether the lessor of the plaintiff is entitled to recover?

Le Mesurier, for the plaintiff.

Gibbs, for the defendant.

LORD MANSFIELD, C. J.

When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term.

If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year: now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement.

As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there to be sure much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature of the first contract.

ASHURST, J. There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases, where the same

hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London, being let to a tenant at Lady-day to hold as in the present case: if the landlord should give notice to quit at Michaelmas, he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings.

BULLER, J. It is taken for granted by the counsel for the plaintiff, that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent: then if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case: an annual rent is here reserved; and upon such a holding it has been determined that *half a year's notice* to quit is necessary. This doctrine was laid down as early as in the reign of Henry the Eighth (13 H. VIII. 15 b).[1] The moment the year began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the Year-Books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also. *Judgment for the defendant.*

ROE d. JORDAN *v.* WARD.

COMMON PLEAS. 1789.

[*Reported* 1 *H. Bl.* 97.]

EJECTMENT for a messuage, &c. John Jordan was tenant for life, remainder to his son, the lessor of the plaintiff, for life: remainders over. John Jordan, the father, on the 22d of June, 1785, made a lease of the premises by indenture, to the defendant, for twenty-one years, to commence from Old Lady-day, which was the 5th of April then last; on which day the defendant had entered. On the 30th of September, 1785, John Jordan, the father, died; on whose death the estate came to the lessor of the plaintiff, his son. The defendant continued in possession, and paid rent to the lessor of the plaintiff, after the death of his father, for two years together, on Old Lady-day and Old Michaelmas-day. Before Old Michaelmas-day, 1787, the lessor of the plaintiff gave the defendant notice to quit on Old Lady-day, the 5th of April then next; and on his refusing to quit brought this action.

[1] The following remark of Serjeant Willoughby is the passage referred to: "If the lessee does not give him notice before the half year, he can justify for the next year, and so from year to year."

An objection was made at the trial, that the notice to quit on the 5th of April was bad; that it ought to have been on the 30th of September, the end of the year, dated from the death of John Jordan, the father; all the defendant's interest derived from the lease, having ceased on that event, as John Jordan the father, had no power to make a lease to endure beyond his own life.

Mr. Justice *Ashurst*, who tried the cause, left it to the jury, whether they would not presume a new agreement between the lessor of the plaintiff and the defendant, that the defendant should continue to hold according to the terms of the original lease; as the lessor of the plaintiff had received rent from him during two years, after the death of John Jordan, the father, on the original days of payment, namely, Old Michaelmas and Old Lady-day; and if so, the notice to quit was proper. But a verdict was found for the defendant.

In Trinity Term last, a rule was granted to show cause, why this verdict should not be set aside, and a new trial granted.

Against which, *Lawrence*, Serjt., now showed cause.

Le Blanc, Serjt., in support of the rule.

Lord Loughborough. The jury found a wrong verdict in this case. The notice to quit on the 5th of April was proper, as payment of the rent had been made on that day. It was also fair and just in the lessor of the plaintiff, to give the tenant notice to quit when his year ended, that the course of his husbandry might not be disturbed.

Heath, J. The defendant was tenant at sufferance, on the death of the tenant for life; and the rent being paid on the 5th of April, was evidence of an agreement to hold from that day.

Wilson, J. As there was no express agreement between the lessor of the plaintiff and the defendant, relating to the premises given in evidence, we must collect what their agreement was, from something done by them. The payment of rent by one, and the acceptance of it by the other, on the same day on which the defendant originally entered, was sufficient evidence of a relation back between them: and though the indenture itself was made on the 22d of June, it related back to the 5th of April. Although the title of the defendant, under the indenture, ended on the 30th of September, yet the payment of rent on the 5th of April was evidence of an agreement that he should continue to hold in the same manner as he did by the indenture; insomuch, that if in the lease there had been covenants for particular modes of husbandry, and the defendant after the death of the tenant for life, had neglected to perform them, the lessor of the plaintiff might have maintained an action on the case against him, stated the covenants, and then averred an agreement to perform them, according to the terms of the original lease; of which agreement, the continuing to pay rent on the 5th of April for two years together, would have been good evidence.

Rule absolute without costs.[1]

[1] See *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; *Doe* d. *Hindmarsh* v. *Johnson*, 6 Esp. 10; *Humphreys* v. *Franks*, 18 C. B. 323; *Kelly* v. *Patterson*, L. R. 2 C. P. 681.

DOE d. RIGGE *v.* BELL.

KING'S BENCH. 1793.

[*Reported* 5 *T. R.* 471.]

THIS ejectment was on the demise of T. Rigge, guardian of H. and M. Rigge, infants. At the trial at the last assizes at York, before the *Lord Chief Baron*, it appeared that in January, 1790, Wilkinson, as agent for the lessor of the plaintiff, let the farm in question, called Hague's farm, to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the land at Old Lady-day, and the house on the 25th of May following; and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day last was served on the 22d of September, 1792. It was also proved that both the daughters of the lessor of the plaintiff were above 14.

The defendant's counsel objected, first, that the notice to quit was insufficient: the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day; 2dly, that the lessor of the plaintiff claimed as guardian in socage to his daughters, who were both above the age of 14. And the plaintiff was nonsuited.

Chambre, on a former day, obtained a rule, calling on the defendant to show cause why this nonsuit should not be set aside. As to the first objection, he said, this was a holding from Lady-day, and that, therefore, the notice to quit was regular; and as to the second he produced an affidavit, in which it was stated, that one of the daughters of the lessor of the plaintiff was under 14 years of age.

Cockell, Serjeant, and *Walton*, were now to have shown cause against the rule; but

Law, *Chambre*, and *Barrow*, were desired to answer the first objection; as to which they argued, that as that agreement for seven years was void by the Statute of Frauds, it being by parol, the defendant must be considered as tenant from year to year, that year commencing at Lady-day when he entered; and that consequently the notice to quit at Lady-day, served more than half a year before, was regular.

LORD KENYON, C. J. Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it was agreed, that the defendant should quit at Candlemas: and though the agreement is void as to the number of years for which the defend-

ant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas.

Rule discharged.[1]

CLAYTON *v.* BLAKEY.

King's Bench. 1798.

[*Reported* 8 *T. R.* 3.]

This was an action against a tenant for double rent for holding over after the expiration of his term and a regular notice to quit. The first count of the declaration stated a holding under a certain term determinable on the 12th of May then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence that the defendant had held the premises for two or three years under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred; and the Statute of Frauds directing that any lease for more than three years not reduced into writing shall operate only as a tenancy at will, it was contended at the trial at the last assizes for Northumberland that the holding should have been stated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to that statement, that the plaintiff ought to be nonsuited. *Rooke*, J., however, considering that it amounted to a tenancy from year to year, overruled the objection; and the plaintiff obtained a verdict.

Wood now moved to set aside the verdict, on the ground of a misdirection, relying upon the positive words of the Statute.

Lord Kenyon, C. J. The direction was right: for such a holding now operates as a tenancy from year to year. The meaning of the Statute was that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to inure as a tenancy from year to year.

Per Curiam,

Rule refused.

RICHARDSON *v.* LANGRIDGE.

Common Pleas. 1811.

[*Reported* 4 *Taunt.* 128.]

Trespass for breaking and entering a stable of the plaintiff, and breaking to pieces the doors and locks, and tearing down, damaging, and destroying the bins, troughs, and mangers of the plaintiff, and locking up the stable, and expelling the defendant from his possession.

[1] See *Tooker* v. *Smith*, 1 H. & N. 732.

The defendant pleaded, first, Not guilty; secondly, that R. Crossley, being seised in fee of the premises, by indenture demised to the defendant, among other things, the stable, for a term of twenty-one years yet unexpired, by virtue whereof the defendant entered and was possessed, and by reason of such possession justified the acts complained of in the declaration. The plaintiff, confessing the seisin of Crossley, and the lease to the defendant, replied, that the defendant afterwards, and during the said term of twenty-one years, demised to the plaintiff the said stable with the appurtenances, to hold to the plaintiff during a certain term, that is to say, for so long a time as they, the plaintiff and the defendant, should respectively please, the plaintiff rendering to the defendant a certain compensation between them in that behalf agreed upon for the same, by virtue of which demise the plaintiff entered and was possessed, until the defendant afterwards and *during the continuance of the said term, and interest of* the plaintiff therein of his own wrong committed the said several trespasses. The defendant apprehending that the demise laid in the plea was descriptive of a holding from year to year, instead of rejoining that he had determined his will, rejoined, that he *did not demise* the said stable to the plaintiff in manner and form as the plaintiff had alleged, and tendered issue thereon, in which the plaintiff joined. Upon the trial of this cause, at the Maidstone Summer Assizes, 1811, before *Lord Ellenborough*, C. J., the evidence was, that the defendant having taken a lease of a close of land, and built a shed therein, in August, 1810, let the same by parol to the plaintiff, who was a carrier, upon an agreement made without any reference to time, that the plaintiff should convert it into a stable, and that the defendant should have all the dung made by the plaintiff's horses. The plaintiff, after having for some time occupied it in its original state, laid out about six pounds in putting up a rack and manger, and converting the building to a stable; about the end of the following April the defendant requested him to leave the premises, and upon his refusing to do it till he could suit himself elsewhere, the defendant, in the plaintiff's absence, and without having given him any written notice to quit, forced open the door, took down the rack and manger, and carried it out of the stable, and took and used the manure which had been made upon the premises during the plaintiff's occupation of them, and which was of considerable value. The defendant's counsel contended, that the evidence proved a strict tenancy at will (which, though it made good the defendant's case, the plaintiff by his replication himself alleged, and the defendant by his rejoinder denied), and that therefore the defendant was entitled at any time to determine his will, and to enter upon the premises and resume the possession when he pleased, without any notice to quit. The counsel for the plaintiff contended that this must be a yearly holding, or that at all events the defendant having put the plaintiff into possession, and suffered him to contract an expense, by erecting a rack and manger, could not countermand the permission at his pleasure, upon the same principle on which, in the

case of *Winter* v. *Brockwell*, 8 East, 308, it was held, that a license once executed, if it be to a thing whereby the party incurs expense, cannot be revoked, unless the grantor tenders to the grantee all the expense which he has incurred in executing the license. Lord Ellenborough, C. J., thought that the demise being so long as each party should respectively please, warranted the defendant in putting an end to the holding when he pleased, and in evicting the tenant without any notice; whereupon the plaintiff, either not adverting to the terms of his issue, or probably fearing that though he had literally proved his issue, and was entitled to a verdict thereon, the defendant would be entitled to judgment *non obstante veredicto*, submitted to a nonsuit.

Best, Serjt., on this day moved for a rule *nisi* to set aside the nonsuit and have a new trial.

Mansfield, C. J. *Winter* v. *Brockwell* has not the slightest resemblance to the present case. You must find some Act of Parliament, or some decision of the courts, that two persons cannot agree to make a tenancy at will. But it is a maxim, that *modus et conventio vincunt legem*. Have you any case where the courts have declared that there must be a tenancy from year to year, the parties having expressly agreed that the holding shall be so long as both parties please? and of that there is evidence here: you say that Lord Ellenborough was of opinion that the evidence did not prove a tenancy for a year: the nonsuit then must have proceeded on the ground that there was such an agreement as the plaintiff has himself stated. Here you speak, all along, of an indefinite agreement. If there were a general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement.

Heath, J. I am of the same opinion. It is said that an indefinite hiring of a servant is an hiring for a year, but those cases do not apply. That presumption is founded upon the universal custom of hiring servants at statute fairs, which is usually for a year. There is no custom that if a man lets premises to another he shall let them for a year.

Chambre, J., denied the proposition, that at this day there is no such thing as a tenancy at will: the taking of the dung by the landlord gave the tenant no term in the premises. Surely the distinction has been a thousand times taken: a mere general letting is a letting at will: if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the courts have said, that is evidence of a taking for a year. That is the old law, and I know not how it has ever come to be changed. The courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none such.

The court refused the rule.[1]

[1] See *accord.*, *Rich* v. *Bolton*, 46 Vt. 84.

BISHOP *v.* HOWARD.

KING'S BENCH. 1823.

[*Reported* 2 *B.* & *C.* 100.]

ASSUMPSIT for use and occupation. Plea, General issue. At the trial before *Abbott*, C. J., at the London Sittings after last Michaelmas Term, it appeared that the defendant had, under a lease which expired at Midsummer, 1821, been in possession of a house belonging to the plaintiff. A short time before Midsummer the plaintiff applied to the defendant to give up the possession, who refused to do so without notice, and continued in possession until Christmas, when he tendered the keys to the plaintiff, who refused to accept them. No positive evidence was given of the payment of any rent at Michaelmas; but it was proved that the defendant paid a quarter's rent in March, 1822, and took a receipt for it, as for a quarter's rent due to the plaintiff at Christmas. This action was brought to recover a quarter's rent alleged to be due at Lady-day, 1822. The Lord Chief Justice left it to the jury to say, whether a new agreement for a tenancy could reasonably be inferred from that which had passed before Midsummer, 1821, and from the payments above mentioned, or whether it was merely a holding over by the defendant. The jury found a verdict for the defendant; and in Hilary Term a rule having been obtained for a new trial,

Scarlett and *R. Scarlett* now showed cause.

F. Pollock, contra.

ABBOTT, C. J. It occurred to me at the trial, that the refusal to quit at Midsummer, and the payment of rent at Michaelmas and Christmas, were facts on which a new contract of renting the premises might or might not be presumed; and I considered it as a question for the jury, and not as a question of law. I therefore left it to them to say, whether a tenancy was created, or whether there was a mere holding over by the defendant; and they found for him. If those acts were conclusive evidence of a new tenancy from year to year, my direction was wrong, and there ought to be a new trial. My learned Brothers think that the commencement of another year and the payment of rent concluded the question in favor of the plaintiff. I have still some slight doubts upon the question, but defer to their authority.

BAYLEY, J. It appears that, before Midsummer, in a conversation between the plaintiff and defendant, the latter insisted upon his right to have a notice to quit; that was holding himself out as tenant of the premises. He continued in possession until Christmas, and in March following, paid rent for the quarter ending at Christmas; that was evidence that a quarter's rent had been paid at Michaelmas. If he paid that money as *rent*, it took away his power to say that he was not tenant, as the receipt of it took away that power from the landlord. In

the case put of an ejectment brought to recover possession, the production of the receipt or proof of the payment of rent at Michaelmas would have been a bar to the action; and the situation of the plaintiff would be singularly hard if he could not maintain either use and occupation, or ejectment. I think, therefore, that there should be a new trial.

HOLROYD and BEST, JJ., concurred.

Rule absolute.

DOE d. TILT *v.* STRATTON.

COMMON PLEAS. 1828.

[*Reported* 4 *Bing.* 446.]

THE lessor of the plaintiff had entered into an agreement to grant the defendant a lease of the premises described in the declaration, for seven years, to commence on the 29th of September, 1820. The lease was never executed, but the defendant occupied the premises, and paid the rent which was to have been reserved by the lease. On the 29th September, 1827, the defendant, having received no notice to quit, refused to deliver up the premises to the lessor of the plaintiff, whereupon the present action was commenced.

At the trial before *Best*, C. J., Middlesex Sittings after Michaelmas Term last, a verdict was taken for the lessor of the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the court should be of opinion that he was entitled to notice to quit.

Jones, Serjt., accordingly now moved to enter a nonsuit.

BEST, C. J. We should multiply notices to quit unnecessarily if we held that this action did not lie. Within the seven years the defendant could not have been turned out without notice; but at the end of the seven years the contract itself gives him sufficient notice. The point is, in effect, decided in *Doe d. Bloomfield* v. *Smith*, 6 East, 520, and *Doe d. Oldershaw* v. *Breach*, 6 Esp. N. P. C. 106.

PARK, J., concurred.

BURROUGH, J. During the seven years notice would have been necessary, but not at the end of that period.

GASELEE, J. Notice was not necessary in this case, nor does the agreement give one party any advantage over the other.

Rule refused.

COX *v.* BENT.

COMMON PLEAS. 1828.

[*Reported* 5 *Bing.* 185.]

REPLEVIN for taking the plaintiff's goods in a place called the Newcastle Brewery.

Avowry, that the plaintiff for a year ending March 25, 1827, held

the Newcastle Brewery as tenant to the defendants, by virtue of a demise thereof to him, at the yearly rent of £450, payable half-yearly on 25th March and 29th September, and, because a year's rent was due, the defendants avowed the taking, &c.

Pleas, *Non tenuit* and *Riens in arriere*, and issue thereon.

At the trial before *Gaselee*, J., last Stafford Summer Assizes, it appeared that the plaintiff held the premises in question under an agreement bearing date 7th December, 1824, by which the defendants agreed to let and demise them to him "in consideration of the rent of £450, and of the covenants and agreements to be entered into by the said C. Cox, in a certain indenture of lease to be executed on or before the 29th day of September next ensuing." The plaintiff had paid no rent, but an account of various dealings between him and the defendants had been presented to him by the defendants' clerk, the first item of which was, "Half a year's rent, £250;" when the plaintiff said, "It is overcharged £25;" and the clerk thereupon altered it to £225. The account had been disputed in other respects.

The learned judge thought that, by thus assenting to that item in the account, the plaintiff had admitted a tenancy from year to year at £450 rent, payable half-yearly; and, under his direction, a verdict was found for the avowants, which

Russell, Serjt., now moved to set aside, and enter instead a verdict for the plaintiff.

Gaselee, J. I proceeded on the ground that the admission was equivalent to a payment of so much rent, and that the plaintiff had thereby become tenant from year to year.

Best, C. J. This falls within the principle established by *Knight* v. *Benett*, 3 Bing. 361.

Rule refused.

RICHARDSON *v.* GIFFORD.

King's Bench. 1834.

[*Reported* 1 *A. & E.* 52.]

Assumpsit for non-repair of premises held by the defendant as tenant to the plaintiffs. The first two counts stated an agreement by the defendant to repair, &c., in consideration of a demise. The third count alleged, "That, in consideration that the defendant, at his request, had become and was tenant to the plaintiffs, as executors as aforesaid, of certain other premises, with the appurtenances, of the plaintiffs as executors as aforesaid, upon and subject to the terms that the defendant should, as such tenant, during his last-mentioned tenancy, keep the last-mentioned tenements in tenantable repair, order, and condition, the defendant then and there promised the plaintiffs, as such executors, to keep the last-mentioned tenements in tenantable

repair, order, and condition, during his last-mentioned tenancy. And although such tenancy continued from thence hitherto, to wit, &c., yet the defendant did not nor would during such tenancy keep the last-mentioned tenements in tenantable repair, order, or condition," &c. Plea, the general issue. At the trial before *Denman*, C. J., at the sittings in London after last Hilary Term, the following instrument was offered in evidence. It was dated the 18th of February, 1829, was stamped as an *agreement*, signed by the defendant, and addressed to Mrs. Richardson, the testator's widow, who, according to the case for the plaintiffs, acted in this behalf for the executors.

"MADAM, — I engage to take the premises (say dwelling-house, grounds, garden, &c., together with the field), late in your possession at Layton, from the present half-quarter for the term of three years, at the rent of £140 per annum, payable quarterly on the four most usual days, including in the first payment the amount due from the present time to Lady-day next. I further engage to keep the said premises in good repair during the whole of the time they shall be in my occupation, and to insure the house, &c. for the same sum of money as is expressed in the lease from Mr. Copeland" (the head landlord), "as well as to pay all taxes, rates, &c., for which you would have been liable if still occupying the said house."

The defendant's counsel contended, that this document was inadmissible as a lease, because not properly stamped; and that it could not operate as an agreement for a term of more than three years, because it was not signed by both parties, according to 29 Car. 2, *c.* 3, §§ 1, 2. The Lord Chief Justice received the evidence, subject to a motion to enter a nonsuit. It was proved that the defendant held the premises for something more than three years; and evidence was given as to the non-repair. The Lord Chief Justice left it to the jury, in the first place, whether the alleged contract was made with the executors or the widow (as to which there was much dispute on the trial); secondly, whether the defendant had broken his contract, which, his Lordship was of opinion, bound the defendant to keep the premises in good and tenantable repair; and, thirdly, what was the amount of damage. The jury found a verdict for the plaintiffs for £100.

Bompas, Serjt., now moved to enter a nonsuit, according to the leave reserved.

LITTLEDALE, J. It was properly left to the jury, whether or not this contract was made with the widow, as agent of the executors; and they having found that it was, the only remaining question is, whether he was bound by the contract to keep the premises in tenantable repair. If this had been a valid agreement for a term of three years or more, it is clear such a term would be a sufficient consideration for the promise on his part, upon which the count in question is founded. But, it is said, he took no legal estate for that term, and could therefore be liable only to such repairs as a tenant from year to year may be charged with. It appears to me, however, that in a case of this kind

(and it is not like one in which there has been a concealment practised as to the plaintiff's title), if a party chooses to rely on being merely let into possession, to waive a lease, and at the same time to engage that he will keep the premises in tenantable repair during the whole time they shall be in his occupation, he is bound by that agreement.

Parke, J. In the first two counts the case is shaped as upon a demise for a term; and I agree that those counts are not supported, there being no contract signed by both parties, and no lease duly stamped. But the third count is free from this objection, and is sustained by the evidence. It appears that the defendant made a contract with Mrs. Richardson, by which he engaged to keep the premises in good repair during all the time they should be in his occupation; he did not, by that contract, legally agree for a term of three years; but, in point of law, he was tenant at will for the first year, subject to the terms of the agreement on his own part; and afterwards, tenant from year to year, subject still to that agreement, which bound him to keep the premises in good repair so long as he should occupy. Possibly, if an attempt had been made to remove him after he had incurred expense under the agreement, he might have been entitled to call upon a court of equity; but, at all events, he had contracted by an express undertaking to keep the premises in repair, and by that he was bound. It was competent to the executors to show, that the contract made by Mrs. Richardson was entered into for their benefit; that point was properly left to the jury, and they have found for the plaintiffs.

Patteson, J. I am of opinion that the third count was supported. The defendant became tenant from year to year on condition of keeping these premises in good repair. It is said, such an engagement must be looked upon as made in consideration of the length of time the defendant was to occupy; and that, if that consideration fails, the defendant's agreement must fail also. But it is too much to say here that the consideration has failed. I do not put this on the ground that a court of equity would give a remedy in the case suggested: but that there is no proof that the defendant might not have had the term of more than three years secured to him if he had applied for it.

Lord Denman, C. J. As to the state of repair, I only put it to the jury, whether the premises had been kept in good and tenantable repair. I think there is no reason to disturb their verdict.

Rule refused.[1]

[1] *See Leslie* v. *Sanders*, 3 Bing. N. C. 850; *Digby* v. *Atkinson*, 4 Camp. 275.

DOE d. TOMES *v.* CHAMBERLAINE.

EXCHEQUER. 1839.

[*Reported* 5 *M.* & *W.* 14.]

EJECTMENT for a piece of land at Leamington. At the trial before *Lord Denman*, C. J., at the last Warwick Assizes, it appeared that the defendant had been let into possession of the land in question by the plaintiff, under an agreement of purchase, dated the 22d Feb., 1833, by which it was stipulated that the defendant should be let into possession forthwith, paying interest after the rate of £5 per cent per annum on the amount of the purchase-money until the completion of the purchase, which was to be completed by the 22d May then next. The defendant had remained in possession of and built upon the land, and no evidence was given to show that any conveyance had been tendered to him, or that the plaintiff had taken any steps to enforce the completion of the purchase: but the defendant failing to pay the interest punctually, the present ejectment was brought, no notice to quit having been first given. It was contended for the defendant, that by the operation of the agreement a tenancy from year to year was created between the parties. The learned judge was of opinion that the defendant had nothing more than an estate at will, and directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

Goulburn, Serjt., now moved accordingly [citing *Saunders* v. *Musgrove*, 6 B. & C. 524].

LORD ABINGER, C. B. I think there is no ground for a rule. If this were a case in a court of equity, it is clear the court would not allow the vendor to take back the estate, unless he were in a condition to fulfil the contract on his part. But in a court of law, we can only look at the legal title. This is not an estate for years, for life, in tail, or in fee: there is no annual reversion of rent, but only a reversion of interest until the principal money is paid, and the contract completed. In the case cited, there was a clear intention to create a tenancy at a fixed annual rent; here there is nothing of the kind.

PARKE, B. At law, this is nothing more than an estate at will; there is a provision also for payment of interest, but not by way of compensation for the occupation of the land: the agreement for payment of interest is quite independent of the occupation of the estate. In *Saunders* v. *Musgrove*, it was clear that a sum of £100 a year was to be paid as a compensation for the occupation of the premises, by equal half-yearly payments: that was clearly in the nature of a rent until the 25th of December then following, and if the contract were not then completed, to go on upon the same terms. That is not so here: and if the party be let into possession, he has nothing but the lowest estate

known to the law, viz., an estate at will, which may be determined by demand or by entry.

ALDERSON, B. I am of the same opinion. *Saunders* v. *Musgrove* was in effect the case of a letting at a yearly rent.

GURNEY, B., concurred.

Rule refused.

DOE d. THOMSON *v.* AMEY.

QUEEN'S BENCH. 1840.

[*Reported* 12 *A. & E.* 476.]

EJECTMENT, on the several demises of Elizabeth Thomson and others, to recover possession of a farm occupied by the defendant.

On the trial, at the Cambridge Spring Assizes, 1839, before *Tindal*, C. J., it appeared that on 29th July, 1835, articles of agreement had been entered into between Miss Thomson, the lessor of the plaintiff, and the defendant, whereby Miss Thomson, for and on behalf of herself and others, devisees in trust under the will of her father, in consideration of the rent and covenants thereinafter mentioned to be paid and performed by the defendant, agreed with the defendant, so far as she lawfully could or might, that she and all other necessary parties should and would grant a lease of the farm to defendant, excepting out of the said lease agreed to be made all trees, mines, &c., with liberty of ingress and egress for the intended lessors, for fourteen years, from 11th October then next, at a rent of £346, payable quarterly. And it was thereby agreed, that there should be contained in the lease covenants to repair, the said "intended lessors" finding rough timber; that defendant should not assign without license; that defendant should use the premises agreed to be demised in a husbandlike and proper manner according to the best system of husbandry practised in that part of the country; that defendant should, during the said term, scour ditches and drains, and make and renew hedges; that defendant would not destroy any trees, nor grow two successive crops of white corn or grain on any of the arable land without summer tilling, or taking a green fallow crop; nor sell or suffer to be taken off the premises any of the hay or straw grown, or manure made thereon, but should spend them on the premises. And it was further agreed that the lease should contain a proviso empowering the intended lessors to enter on the premises as of their former estate in case defendant should fail in observing any of the covenants or agreements therein contained; and all other usual and proper covenants in leases of a like nature. It was also agreed that defendant should execute a counterpart of the lease, and defray the expense of the articles of agreement.

The defendant entered into possession at the time fixed for the commencement of the term, and continued to hold and pay the rent until action brought, but no further lease was ever made or executed.

Before the commencement of the action, notice of several breaches of agreement was served on the defendant by the lessor of the plaintiff. One of these, namely, that defendant had taken successive crops of white corn on the same land without summer tilting or green fallow, was satisfactorily proved on the trial, and the plaintiff had a verdict, subject to a motion for a nonsuit on the grounds hereafter stated.

In the following term, *B. Andrews* obtained a rule *nisi* in pursuance of the leave reserved.

Kelly now showed cause, but was stopped by the court.

B. Andrews and *Gunning*, contra.

LORD DENMAN, C. J. In this case the defendant was let into possession under an agreement, which gave the parties a right to go into equity to compel the execution of it by making out a formal lease. Under such circumstances it has long been the uniform opinion of Westminster Hall, that the tenant in possession holds upon the terms of the intended lease. One of these terms was, that the lessee should not take successive crops of corn, and that the lessor should have power to re-enter on the breach of such agreement. This agreement and proviso apply to the yearly tenancy of the defendant. It has been argued, that the terms of the lease cannot be applied to the parol tenancy, inasmuch as some of them, such as the agreement for repairs, are not usually considered as applicable to such tenancy. Whether the obligation to repair can be enforced under such circumstances, at least as to substantial repairs, may perhaps be questionable; but at all events, the agreement as to cropping the land is one which is consistent with a yearly tenancy.

PATTESON, J. In *Mann* v. *Lovejoy*, Ry. & M. N. P. C. 355, though the facts differed from those of the present case, yet, in principle, the ruling of Abbott, C. J., is in favor of the plaintiff. It is said, that a covenant respecting the rotation of crops cannot be engrafted on a yearly tenancy; but I see no reason why it should not. The tenant in possession under such circumstances is bound to cultivate the land, as if he were going to continue in possession as long as the lease itself would have lasted. It is argued, that the tenancy arises by operation of law upon the payment of rent, and that the law implies no particular mode of cropping, nor any condition of re-entry. But the terms upon which the tenant holds are in truth a conclusion of law from the facts of the case, and the terms of the articles of agreement; and I see no reason why a condition of re-entry should not be as applicable to this tenancy as the other terms expressed in the articles.

WILLIAMS, J. It is admitted, that, if this were a case of holding over, the terms of the written agreement would apply. In principle, there is no distinction between that case and the case of a tenant who enters and pays rent upon the faith of an executory agreement for a lease. *Rule discharged.*[1]

[1] See *Thomas* v. *Packer*, 1 H. & N. 669.

DOE d. CLARKE *v.* SMARIDGE.

Queen's Bench. 1845.

[*Reported* 7 *Q. B.* 957.]

Ejectment for a messuage and land in the parish of Halwell, Devon. Demise, April 13th, 1843.

On the trial, before *Patteson*, J., at the Exeter Summer Assizes, 1844, the following facts appeared. The defendant held of the lessor of the plaintiff under a written agreement for a term which expired at Lady Day, 1842. After that day he held over without any express agreement. He paid the usual rent at midsummer, which was accepted by Clarke. Before Michaelmas, 1842, Clarke gave the defendant notice to quit at Lady Day, 1843. Defendant did not quit at that time: and after that time Clarke distrained for balance of the rent due at Lady Day, 1843. The defendant's counsel contended that, by his continuing to hold after Lady Day, 1842, a new tenancy commenced, from year to year: and that such tenancy must necessarily be for two years certain. The learned judge was of opinion that the doctrine of a tenancy from year to year, inuring for two years at least, did not apply to a holding over after the determination of a lease for a year certain: and he refused to nonsuit on the objection. He told the jury that the continuance of the relation of landlord and tenant, between Clarke and the defendant, after Lady Day, 1842, was clear from the distress; but that Clarke was entitled to recover the premises after the expiration of one year, unless the evidence showed an agreement for a longer term: and on this latter question he left the case to the jury. Verdict for plaintiff. *Crowder*, in the ensuing term, obtained a rule to show cause why a nonsuit should not be entered.

Cockburn and *Barstow* now showed cause, and *Crowder* supported the rule.

Cur. adv. vult.

Lord Denman, C. J., in the same vacation (July 9th), delivered the judgment of the court. After stating the facts, his Lordship proceeded: —

It is plain that, under those circumstances, a tenancy from year to year arose; and the question is whether it inured for two years certain from Lady Day, 1842. Now a tenancy from year to year lasts only so long as both parties please; that is, it is determinable by either party at the end of any year, by giving notice to quit half a year before the end of the year. There is no reason why it should not be so determined at the end of the first year, as well as at the end of any subsequent year, unless the parties have by express contract prevented such determination. In the cases of *Ayard* v. *King*, Cro. Eliz. 775; *Denn*

d. Jacklin v. *Cartwright*, 4 East, 29; *Bellasis* v. *Burbrick*, 1 Salk. 209; s. c. 1 Ld. Raym. 170; *Legg* v. *Strudwick*, 2 Salk. 414; *Birch* v. *Wright*, 1 T. R. 378, 380; *Doe d. Chadborn* v. *Green*, 9 A. & E. 658; *Rex* v. *Chawton*, 1 Q. B. 247, such express contract appeared either by the pleadings or the evidence. In this case there is no such express contract, but a tenancy for two years at least is supposed to be implied of necessity by law. The case of *Bishop* v. *Howard*, 2 B. & C. 100, was cited for the defendant, some words which fell from Lord Tenterden being supposed to be applicable; but on looking at that case it will be found that the words there used do not affect the present question: they show only, that by holding over, and payment of rent as rent, a tenancy from year to year is created; but they do not touch the question when that tenancy may be determined.

We are of opinion that the tenancy from year to year so long as both parties please is determinable at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use expressions showing that they contemplate a tenancy for two years at the least. Here there are no such words: and the notice to quit was therefore sufficient.

We are aware that this decision may appear at variance with an impression which has prevailed in Westminster Hall, and has perhaps derived some countenance from the words of Lord Tenterden in *Bishop* v. *Howard*, though they were perfectly unnecessary for that decision. But the authorities, when examined, certainly do not warrant the conclusion that has been drawn from them, for the reason above given: and it would be absurd in principle, and even inconsistent with the contract, to hold that the tenancy exists from year to year, determinable by half a year's notice by either party, and yet to hold that neither can give such notice during the first year. The rule must be discharged.

Rule discharged.

MAYOR, &c., OF THETFORD *v.* TYLER.

QUEEN'S BENCH. 1845.

[*Reported* 8 *Q. B.* 95.]

DEBT; laid at £40 for use and occupation of an inn, messuage, &c., and £40 on an account stated.

Pleas. 1. Except as to £23 10*s.*, parcel, &c., never indebted. Issue thereon. 2. As to £11 15*s.*, parcel of the said £23 5*s.*, and the damages by detention thereof, payment of £11 15*s.*, and acceptance in satisfaction by plaintiffs. Verification. The plaintiffs, by their replication, denied the payment and acceptance; and issue was joined thereon. 3. As to £11 15*s.*, residue of the said £23 10*s.*, and the damages, &c., payment into court; which the defendants accepted.

On the trial, before *Alderson*, B., at the Norwich Summer Assizes, 1844, it appeared by the particulars of demand that the action was brought to recover half a year's rent of the Red Lion inn at Thetford (the property of the corporation), from 11th October, 1843, to 6th April, 1844, at the rate of £80 a year. The defendant's mother had held the premises seven years, ending October 11th, 1843, by demise from the corporation, at the yearly rent of £47. In February, 1843, the corporation (having given Mrs. Tyler notice to quit) advertised the premises to be let by tender, upon lease for ten years from the ensuing 11th October. The defendant made a tender, proposing to rent the premises at £80 a year for the term proposed, a lease being drawn with certain specified covenants, and the corporation putting the premises into repair before the commencement of the term. The acceptance of this offer was proved by the corporation minutes, which stated that, on the meeting of the town council, March 31st, 1843, there were three tenders (naming the parties and amounts); that the votes for the tenders respectively were, &c. (stating the numbers): "and the tender of C. D. Tyler was accepted at £80; and the town clerk was directed to prepare the lease." At a meeting of the council on 6th April, 1843, the defendant and his mother requested that the corporation would accept him as tenant for the remainder of her term. This was assented to; and the defendant in the same month took possession. In May, 1843, the defendant requested the corporation to paint (which, as he alleged, the terms of the tender obliged them to do), and to repair. The demands were not complied with. In November, 1843, the town clerk sent the defendant a draft of lease for perusal; but he declined executing such lease, because the premises had not been repaired before the 11th October, 1843, and because the draft did not mention certain privileges which, according to the advertisement, were to be included. The parties finally disagreed on these points; and no lease was executed. The corporation repaired the premises; but the repairs were not finished till April, 1844. The rent, to October 11th, 1843, was paid up; and the defendant, in February, 1844, paid the treasurer of the corporation £11 15s. as the quarter's rent from October 11th, 1843, to January 6th, 1844, at the former rate.[1] The corporation insisted upon rent at the rate of £80 specified in the tender, and declared in the present action in June, 1844.

It was contended for the plaintiffs on the trial that, in default of express agreement, the defendant was liable to pay so much for rent as a jury should think the occupation worth; and that this, by the evidence on the point, appeared to be £80 a year. For the defendant it was urged that the case was one of those in which a party holding over is considered to hold on the terms of the original tenancy. *Alderson*, B., thought that the latter principle did not apply, for that, in this case, the

[1] It was agreed on the trial that the receipt of this sum was not to be taken as an admission on the part of the plaintiffs, but that it entitled the defendant to a verdict on the second issue. — REP.

defendant must be considered a stranger to the original tenancy: but he reserved leave to move on this point; and he directed the jury to consider what was a fair rent for the defendant to be charged with, making him an allowance for the neglect of the corporation to repair. Verdict for plaintiffs on the first issue, for £11 10s.; on the second issue for defendant.

Hugh Hill, in Michaelmas Term, 1844, obtained a rule to show cause why a verdict should not be entered for the defendant on the first issue.

Byles, Serjt., and *Worlledge*, now showed cause.

H. Hill, contra.

Lord Denman, C. J. The fallacy in Mr. Hill's argument lies in making the plaintiffs' case depend upon a contract to pay the higher amount of rent. But the case rests upon a principle resulting from the nature of an action for use and occupation, namely, that he who holds my premises without an express bargain agrees to pay what a jury may find the occupation to be worth. Where a party, having held for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there be no evidence to the contrary, that he holds at the former rent. But in the present case there is so clear an indication of an intent to alter the terms that that principle cannot apply. If the premises, for want of repair, had fallen in value below the old rent, the plaintiffs could not have insisted that the defendant should hold on at £47 a year: neither are they bound, as the case stands, to go on receiving £47 only. Whose fault it was that the new tenancy did not come into operation, is left uncertain; but that makes no difference in the decision. The rule must be discharged.

Williams, J. I am of the same opinion. Under the peculiar circumstances, the ordinary inference of law does not arise.

Wightman, J. When a party is allowed to hold after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law. If there is nothing to show a different understanding, he will be considered to hold on the former terms: but here we have evidence to the contrary. The terms of the future holding were stated by an agreement anterior to the defendant's possession: he was to come in on those terms at the expiration of the tenancy then subsisting: and then, for reasons of convenience, he was let in before that tenancy expired. Under such circumstances it was properly a question for the jury, what amount of rent was to be paid when the new holding began, the agreement not taking effect. The usual inference from the original terms of holding did not arise, and the question was left open.

Rule discharged.[1]

[1] See *Doe* d. *Lord* v. *Crago*, 6 C. B. 90; *Oakley* v. *Monck*, 3 H. & C. 706; L. R. 1 Ex. 159.

DOE d. BASTOW *v.* COX.

QUEEN'S BENCH. 1847.

[*Reported* 11 *Q. B.* 122.]

EJECTMENT for premises in Surrey. On the trial, before *Coltman*, J., at the last Surrey Assizes, it appeared that the defendant, on June 18th, 1844, mortgaged his interest in the premises to the trustees of a building society, now lessors of the plaintiff, by a deed containing this proviso: —

"The said W. Cox doth hereby agree to become tenant to the said R. Bastow," &c., "their executors," &c., "of the premises hereby demised, henceforth, at their will and pleasure, at and after the rate of £24 4*s.* per annum, payable quarterly."

The defendant retained possession and paid a year's rent, but afterwards made default; in January, 1847, the lessors of the plaintiff distrained for four quarters' rent then due; and on May 6th, 1847, they gave him notice to quit in a week: which not being obeyed, the present action was brought. The defendant's counsel insisted that, by the proviso, he was tenant from year to year, and entitled to six months' notice. *Coltman*, J., was of a different opinion, but reserved leave to move for a nonsuit. Verdict for plaintiff.

Lush now moved that a nonsuit might be entered.

LORD DENMAN, C. J. The courts are desirous to presume a tenancy from year to year, where parties do not express a different intention; but here they have expressed it. To hold otherwise would be going beyond any decided case.

COLERIDGE, J. Mr. Lush says the rule has been to presume in favor of a yearly tenancy. But it is also a rule that documents shall be construed according to the apparent intention; which, in the present instance, clearly is to create a tenancy at will. Rent, at the rate of £25 4*s.* per annum, is to be paid quarterly; but that is, if the will continues undetermined: otherwise the reservation by quarters will not take effect.

WIGHTMAN, J. I am of the same opinion. The meaning of the reservation is, that the tenant shall pay at such and such a rate during the time for which he may occupy.

ERLE, J. I am of the same opinion. The intention is, that the tenant shall hold at the will of the lessors, and at will only.

Rule refused.

HYATT *v.* GRIFFITHS.

QUEEN'S BENCH. 1851.

[*Reported* 17 *Q. B.* 505.]

TRESPASS. 1st count for cutting down, reaping and mowing plaintiff's growing wheat; 2nd count for taking and carrying away the goods and chattels, viz. one thousand loads of unthreshed wheat, and one thousand loads of straw, of the plaintiff. Pleas: 1. Not guilty. 2. That the wheat was not the wheat of plaintiff. 3. That the goods in the 2nd count mentioned were not the goods of plaintiff. Issues thereon.

On the trial, before *Erle*, J., at the Gloucester Summer Assizes, 1851, it appeared that, on 31st August, 1839, Sir Thomas Phillipps, under whom the defendant acted in the alleged trespasses, demised the land on which the wheat in question grew (containing two hundred and thirteen acres, one rood, twenty-nine perches), to the plaintiff and his son William Hyatt for the term of four years from Michaelmas then next, at the yearly rent of £305, payable on the usual quarter days. The lease contained various farming and other covenants, and among them the following: —

"And the said Sir T. Phillipps doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said T. Hyatt and W. Hyatt, their executors and administrators, in manner following, viz.: That they the said T. Hyatt and W. Hyatt, their executors and administrators, shall and may retain and sow forty acres of wheat on the arable land hereby demised at the seedness next after the said term of four years, and to have the standing thereof until the harvest then next following, without paying any rent or making any other consideration for the same, and shall and may have the use of a convenient part in the said messuage, tenement or farmhouse for a servant or two to dwell and lodge therein for the purpose of attending to the threshing out and spending of such crop of wheat. And also convenient room in the said demised barn, stables and yards on the said premises to lay, set and thresh the said wheat crop, and for consuming the straw, chaff and colder arising therefrom, until the 2d day of February next after the end of such harvest as aforesaid, with free liberty for them and their servants to go to and return therefrom, with horses, carriages or otherwise, until the said 2d day of February." Plaintiff's brother had previously held the lands as tenant to a Mr. Coventry, from whom Sir T. Phillipps purchased, under a twenty-one years' lease containing a similar covenant, and had made over his interest to the plaintiff, who held as a yearly tenant from the expiration of that lease, in 1833, till the granting of the four years' lease above mentioned. The holding for twenty-one years was a holding from Lady-day.

While the four years' lease was running, William Hyatt, the son, made over his interest to the plaintiff. The lease expired at Michaelmas, 1848: but the plaintiff continued his occupation as tenant from year to year, at the same rent. At Lady-day, 1849, he gave notice of his intention to quit the premises (describing the land as two hundred and thirteen acres, one rood, twenty-nine perches), at the ensuing Michaelmas;[1] and in October, 1849, he sowed the wheat now in question upon forty acres of the land. The residue was given up to the landlord.[2] At the ensuing harvest the wheat was claimed on the part of Sir T. Phillipps: but the plaintiff alleged that the right to it was in him; for that, notwithstanding the expiration of the tenancy, the clause as to sowing and reaping in the lease of 1839 was impliedly kept up as a term of the demise from year to year. The defendant, on behalf of Sir T. Phillipps, reaped the corn; which was the trespass complained of.

The learned judge stated to the jury that a tenant who holds over after the expiration of a lease may be taken to hold on such covenants of the expired lease as are applicable to a tenancy from year to year: that, whether he does so or not in a particular case is a question of fact: that his lordship was not prepared to say that the covenant in question was not applicable to a yearly tenancy: and that the question he should leave to them was, whether, though there was no express evidence of any terms of demise from year to year, they concluded, from the facts proved, that Sir T. Phillipps demised, and the plaintiff accepted, the lands on the terms alleged by the plaintiff as to the forty acres. His lordship reserved leave to move to enter a verdict for the defendant if the court should think that there was no legal evidence from which a demise on these terms could be inferred. Verdict for plaintiff.

Keating now moved that a verdict might be entered for the defendant, or a new trial had.

Lord Campbell, C. J. If such a term is not inconsistent with a tenancy from year to year, it may be shown by evidence to have been annexed to such a tenancy. It appears that this was: and I think the verdict is right.

Patteson, J. When it is said that a party becoming tenant from

[1] The notice ended: "All which said hereditaments," &c., "are situate," &c., "and were comprised in and described by a certain indenture of lease dated the 31st day of August, 1839, and expressed to be made between Sir Thomas Phillipps, Baronet, of the one part, and Thomas Hyatt and William Hyatt, both of Snowshill aforesaid, farmers, of the other part, and which said hereditaments and premises I now hold of you as tenant from year to year. Dated," &c.

[2] There had been some transactions upon the expiration of the tenancy, by which, as Sir T. Phillipps at that time contended, the plaintiff again became tenant. The plaintiff, however, denied this, alleging that he retained no interest in the land except his right to the wheat upon forty acres, and evidence was given for the plaintiff that he had made this statement in the presence of Sir T. Phillipps, when the parties were before magistrates upon summons on a dispute as to the liability to rate for lands comprising the forty acres, and that Sir T. Phillipps did not contradict it. — Rep.

year to year may be deemed to hold over on the terms of a prior lease for years, that cannot be confined to such terms as are necessarily incident to a yearly tenancy: the rule would then have no meaning. It must include such terms as may be incident.

ERLE, J., concurred. *Rule refused.*

TRESS *v.* SAVAGE.

QUEEN'S BENCH. 1854.

[*Reported* 4 *E. & B.* 36.]

EJECTMENT for stables, &c. in Surrey.

On the trial, before *Alderson*, B., at the last Surrey Assizes, it was proved that a written agreement was executed by plaintiff and defendant on 17th December, 1850. The following were the parts material to the present decision.

"The said Cooper Tress hereby agrees to let unto the said John Savage, and the said John Savage hereby agrees to hire of him, all those stables." &c. "To hold the same unto the said J. S., his executors, administrators and assigns, for the term of three years to be computed from the twenty-fifth day of December instant, yielding and paying unto the said C. T., his executors, administrators and assigns, the annual rent of £48, to be paid monthly on the 25th day of each and every month in the year, the last payment whereof to be made on the 25th day of November, 1853." Agreement by Savage to pay the said rent "at the times and in manner aforesaid."

Upon the execution of the agreement, the defendant entered. It was afterwards orally agreed that the rent should be paid quarterly; which was done up to the last quarter day, 25th December, 1853. For the rent accruing on that day plaintiff distrained on 27th December, 1853: whereupon the plaintiff paid it. On the intervening 26th December, the plaintiff demanded possession; but the defendant refused to quit.

The counsel for the defendant contended that the defendant was entitled to notice to quit. The learned baron directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit.

In last Easter Term, *Pearson*, accordingly, obtained a rule *nisi* for entering a nonsuit.

Lush now showed cause.

Pearson, contra. *Cur. adv. vult.*

COLERIDGE, J., on the next day (June 20th), delivered judgment.

In this case the defendant entered into possession under a written instrument, not sealed, executed by himself and the plaintiff. (His Lordship then read the material parts of the agreement of 17th December, 1850.)

The argument turned upon the effect of the two Statutes, 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106. By § 4 of the former Act, no lease in writing of any freehold land "shall be valid as a lease," "unless the same shall be made by deed; but any agreement in writing to let" "any such land shall be valid and take effect as an agreement to execute a lease;" "and the person who shall be in possession of the land in pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year." Under this section, *Doe dem. Parenish* v. *Moffatt*, 15 Q. B. 257, was decided. There the defendant took possession of land under the terms of a written agreement not under seal, which, before Stat. 7 & 8 Vict. c. 76, came into operation, would have operated as a demise for three years: and it was held that he became tenant from year to year, subject to the terms of the agreement: and that the consequence of this was that at the end of the three years the tenancy expired without any notice to quit. That Statute is repealed by Stat. 8 & 9 Vict. c. 106; § 3 of which substitutes for § 4 of the repealed Act an enactment somewhat differently expressed, and makes a lease, required by law to be in writing, of tenements or hereditaments, "void at law, unless made by deed." It seems to us that the intention of the Legislature is clear in both Statutes. The intention was that leases should not be made except by deed. The first Statute did this ineffectually: it erred in excess, by including, not merely leases of land which by the previous law were required to be in writing, but all leases in writing; and, further, it gave to the unsealed lease the effect of an equitable lease. This it was intended to remedy by the second Statute, which makes such leases of land as must be in writing, and are not made by deed, void as leases, leaving the effect in all other respects as it was before either Act passed.

It seems to us, therefore, that the party entering into possession under such an instrument is in the same position as that in which he would have been before the Acts. He has not a lease, nor a tenancy for the three years and a week; but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then, by the agreement of both parties, he goes out without notice. Nothing in the terms of Stat. 8 & 9 Vict. c. 106, § 3, is inconsistent with this.

My Brothers ERLE and CROMPTON agree in this view of the case: but I believe my Brother WIGHTMAN entertains some doubt.

WIGHTMAN, J. I did entertain some doubt yesterday, as to the language of the repealing Statute: but, after consideration, I come to the same conclusion as my learned brothers.

Rule discharged.[1]

[1] *See Martin* v. *Savage*, L. R. 9 Ex. 59. Cf. *Walsh* v. *Lonsdale*, 21 Ch. Div. 9.

JACKSON d. LIVINGSTON *v.* BRYAN.

SUPREME COURT OF NEW YORK. 1806.

[*Reported* 1 *Johns.* 322.]

THIS was an action of ejectment, brought to recover the possession of a lot of land, distinguished by lot number seven, in class number three, of the house lots in lot number seven, in the subdivision of lot number twelve, in the sixteenth allotment of the Kayaderosseras patent.

The premises originally belonged to one Low, and after his *attainder*, were sold, in 1786, by the commissioners of forfeitures, to Henry Livingston, under whom the lessor of the plaintiff proved his title. In 1775, Low permitted one Norton to occupy the premises, and promised to pay for the improvements if he chose to quit. Norton went away with the British army during the American war, and died. In 1783, his family returned, and his son took possession of the premises. In April, 1787, Henry Livingston gave permission to Norton to sell his improvements to one Morgan, and that Morgan might take possession of the premises, and erect thereon such buildings as he thought proper. Norton accordingly sold his improvements, and transferred the possession to Morgan, who, in the same year, sold them to the present defendant for one hundred dollars. The permission given by Henry Livingston to Morgan, was in writing, but contained no conditions, or any reservations as to rent. At the time the declaration in ejectment was served on the defendant, he admitted that he went on the land under the permission of Henry Livingston; but said, that having been in possession near thirty years, he meant to keep it; that the lessor of the plaintiff had, the last summer, offered to give him a lease, which he declined, as he thought his title as good as that of the lessor of the plaintiff.

The cause was tried at the Circuit, at Saratoga, in June, 1805, before Mr. Justice *Spencer*, who nonsuited the plaintiff, on the ground that the defendant was entitled to a notice to quit. A motion was made to set aside the nonsuit, and the case was submitted to the court, without argument.

THOMPSON, J. The title of the lessor of the plaintiff to the premises in question, is not denied, and the only point raised for decision is, whether the defendant was entitled to notice to quit, prior to the commencement of the action. If the defendant is to be considered a tenant at will, it has been settled in this court, that notice to quit was not necessary; if he is to be regarded as a tenant from year to year, notice was requisite, unless he has done some act amounting to a forfeiture of this right. I am inclined to think, that the defendant can certainly be viewed in no more favorable light than as a tenant at will. He went

into possession as a mere occupant, by permission of those under whom the plaintiff claims: *there was no time limited for the enjoyment, nor any rent reserved, nor has any ever been paid;* neither was there any stipulation to pay him for his improvements. Henry Livingston, under whom the lessor of the plaintiff claimed, had stipulated to pay Gideon Morgan (from whom the defendant got the possession), for his improvements. And it also appears, but from the defendant's own declarations only, that Henry Livingston had given him (the defendant) permission to take off whatever he put on the land. But nothing appears to show, that the lessor of the plaintiff ever gave the defendant permission to occupy the premises, or made any promise to pay for his improvements. Under such circumstances, I should much question whether the defendant could be considered even a tenant at will. Admitting him to have stood in that relation to Henry Livingston, such relationship was destroyed by the conveyance to the lessor of the plaintiff. Courts, it is true, have latterly inclined against construing estates into tenancies at will. But such estates are recognized in our statute book, and must have been recognized by this court, in the decision that such tenants were not entitled to notice to quit. And if the defendant, in the present case, has any greater estate than a tenancy at will, I should be at a loss to determine what would be an estate at will, though it be said (3 Burr. 1609, *Timmins* v. *Rowlinson*), that leases at will, according to the strict legal notion of a lease at will, being in the country found extremely inconvenient, exist only notionally. "Yet," said Mr. Hargrave, Coke Lit. 55 a, note 3, "this observation means not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by express words." See also 3 Salk. 223. Woodfall, 188. De Grey, C. J., says, 2 Black. Rep. 1173, *Roe* v. *Lees*, "all leases for uncertain times, are *prima facie* leases at will, and it is the reservation of an annual rent that turns them into leases from year to year. A general taking under another, without limitation of time, or reservation of an annual rent, can be no other than an estate at will." 2 Sid. 153. Carthew, 101. There is nothing, in such cases, to afford an implication of the renovation of the lease, after the expiration of a former time, which seems to be the basis upon which the doctrine of tenancies from year to year rests. 1 Term Rep. 162. *Right* v. *Darby*, 4 Com. Dig. 60.

But admitting the defendant to have been a tenant from year to year, I should think that he had forfeited his right to a notice to quit, by disclaiming to hold under his landlord. It appears that in the summer previous to the commencement of the present suit, the lessor of the plaintiff offered to lease the premises to the defendant, but that the defendant told him he did not thank him for his offer; *that he had as good a title as he had.*

It also appears, that at the time the declaration in ejectment in this cause was served, the defendant, after some conversation with the witness about his improvements, declared that *he had been in possession*

more than thirty years, and that he meant to keep it. This declaration was, in point of fact, untrue, for he had been there but about eighteen years, and it was setting up in himself a possessory title, in hostility to the right of the lessor of the plaintiff, who, upon the trial, he claimed to be his landlord. It is not denied, that these declarations of the defendant, if they had been made prior to the commencement of the suit against him, would have amounted to a forfeiture of his right to notice to quit. Bull. N. P. 96. I cannot discover how their being made after the commencement of the suit will make any difference. It is not the case of the landlord's *giving notice* to quit after the commencement of his suit, where notice was acknowledged to be necessary; but it was deriving testimony from the confession and declarations of the defendant, to show that he had set up a title in himself, which was at war with the one he claimed upon the trial, and thereby placed himself in a situation that did not require notice to quit. If the defendant be tenant to the lessor of the plaintiff, he is made so by operation of law, and not by any contract between the parties. There was nothing to prevent the defendant from setting up a title in himself, which he did by claiming to hold by virtue of thirty years' possession. His declarations were retrospective, and went to a denial that the relation of landlord and tenant ever existed between him and the lessor of the plaintiff, and that he intended to rely upon his adverse possession. That the confessions of a party were made after the commencement of the suit can be no objection to their admissibility in evidence against him. My opinion, therefore, is, that the nonsuit ought to be set aside, and a new trial awarded.

SPENCER, J. The plaintiff was nonsuited at the trial, for not having given notice to quit. After the service of the declaration in ejectment, the defendant made declarations which may amount to a disclaimer of the title. But these declarations cannot aid the plaintiff. He ought to show a complete right to the possession, prior to the day of the demise, and the institution of the suit. It appears that, in the summer before, the defendant had refused a lease from John Livingston, saying he had as good a title as he had. This evidence I did not, at the trial, nor do I now think, evidence of a disclaimer, because the defendant entered under Henry Livingston, and it did not appear that he had any information of the transfer of his title to the lessor. When a party who is tenant has an indubitable right to notice, and it is sought to deprive him of it on the ground of disclaimer, he ought to be made conusant of the right of a third person demanding his possession. On the principle, therefore, that the defendant did not controvert Henry Livingston's title, and was a stranger to his alienee, I do not think that what he said was such a disclaimer as to be a waiver of notice to quit, if by law he was entitled to it. This presents the only remaining question, whether the estate of the defendant was a tenancy at will, or for years. In the year 1788, the defendant went into possession, under a permission given by Henry Livingston, with leave to erect such buildings as were con-

venient. After so long a possession, and under such circumstances, it cannot, I think, be doubted, that the tenancy would be from year to year. Christian, in his notes to Blackstone's Commentaries, 2 Black. Com. 147, 149, says, "a lease at will is now considered a lease from year to year, which cannot be vacated without half a year's notice to quit;" and he is supported by the text. 3 Burr. 1609. Tenancies at will exist nominally, and good policy, as well as common justice, seems to demand, that a holding, for an indefinite period, should be construed a tenancy from year to year; that no sudden determination of the estate, by the caprice of the lessor, should immediately dispossess the tenant; and, more especially, when he is in possession, not as a trespasser, but by right, that he should not, without the least notice, be subjected to the costs of a suit in ejectment. It is true, that the reservation of a yearly rent is one of the criteria by which to distinguish a tenancy from year to year; but, in good sense, the landlord's right to sue for use and occupation is equivalent to an express reservation of rent. I am still of opinion that the nonsuit was right, and that the plaintiff should take nothing by his motion.

KENT, C. J., concurred.

TOMPKINS, J. I concur in the opinion that the plaintiff ought to be nonsuited. As the defendant held the premises by permission of the owner, without any agreement as to the tenure, and not for any limited period, or with the reservation of rent, I am disposed to regard him as tenant at will merely. The question then occurs, whether such a tenant is entitled to notice of the determination of his landlord's will, before he can be subjected to an action of ejectment? If in the determination of that question, principles of policy and justice are to have weight, such notice will be deemed indispensable; otherwise, an indigent tenant might, at the arbitrary discretion of a landlord, without a moment's warning, at an inclement season, and under circumstances of great embarrassment, be instantly deprived of a home, or submit to the costs of an action ruinous to him. But upon the ground of authority I am inclined to think, that a tenant at will is entitled to a notice to quit. The case of *Parker d. Walker* v. *Constable*, 3 Wils. 25, where this point was expressly adjudicated in favor of the tenant, has not, as I can find, been overruled. In this case a notice of six months was deemed necessary. So where a parol lease for a longer term than three years is made, which the Statute of Frauds declares shall have no other or greater force and effect than a lease or estate at will, six months' notice has been adjudged necessary. *Doe d. Rigge* v. *Bell*, 5 Term Rep. 471. The same motives of civil convenience, which have induced courts, of late years, to construe estates at will into tenancies from year to year, operate most strongly in favor of requiring a reasonable notice to a tenant, of the determination of the will of his landlord.

It is nowhere said that a notice is not necessary. Elementary writers concur in saying that notice of some kind is necessary, and the true

rule to guide us is, that the notice must be reasonable. The period of six months appears to me to comport to that rule; and as I find that period adopted in some authorities, and not expressly negatived by any, my opinion is, that it ought to be adopted here.

Livingston, J., being related to the lessor of the plaintiff, gave no opinion.

Judgment of nonsuit.[1]

ELLIS *v.* PAIGE.

Supreme Judicial Court of Massachusetts. 1822.

[*Reported* 1 *Pick.* 43.]

This was an action of trespass *quare clausum fregit.*

At the trial before *Wilde*, J., in May Term, 1821, the plaintiff introduced evidence tending to prove that in April, 1819, Paige, as the agent of one Bond, leased to the plaintiff by parol a parcel of land, with a dwelling house standing thereon, in Ware, for the term of one year, reserving rent; that Ellis thereupon went into possession; and that on the 30th of September, Paige forcibly entered into the dwelling house, and with the aid of the other defendants, without the consent, and against the will of the plaintiff, removed the wife and the property of the plaintiff therefrom into the highway. The plaintiff attempted also to prove that the door of the house was broken by Paige, but there was some reason to believe that it was first partially opened by the wife of the plaintiff, and that Paige, taking advantage of this partial opening, forcibly effected his entrance without any actual breaking. It appeared that either on the 17th, or on the 20th of September, Paige, as the agent of Bond, gave notice to the plaintiff to quit the demised premises.

Upon this evidence the jury were instructed, that if they believed that the door of the house was found by Paige wholly or partly open, so that he entered without any actual breaking, the plaintiff was not entitled to recover: — that under the Statute of this Commonwealth, this parol lease for a year was to be considered as a lease at will, and the will of the lessor having been determined by the notice to quit, trespass *quare clausum* could not be maintained by Ellis for any entry by the landlord, or his agent, subsequent to this notice; and though within a reasonable period after the determination of the tenancy at will, the tenant might be entitled to free ingress and egress for the purpose of effecting his removal, or, in other words, to reasonable notice to quit, yet what notice was reasonable, was a question of law: — and that the notice which had been proved, whether given on the 17th, or the 20th of September, was reasonable notice.

The jury found a verdict for the defendants. If these instructions were incorrect, a new trial was to be granted.

[1] See *Jackson* d. *Church* v. *Miller*, 7 Cow. 747. Cf. *Leavitt* v. *Leavitt*, 47 N. H. 329.

The case was argued at September Term, 1821, and continued for advisement.

Strong, for the plaintiff.

F. H. Mills and *Howe*, for the defendants.

The opinion of the court was delivered at April Term, 1823, at Northampton, by

WILDE, J. The first question to be determined is, whether a parol lease for a year is valid according to the terms of it, or whether it is an estate at will only.

By the Statute of 1783, *c.* 37, § 1, it is enacted, that all leases by parol, and not put in writing and signed by the parties so making the same, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect.

The language of the Statute is plain and unambiguous, and when such is the case, the will of the legislature must be obeyed. That will could not have been expressed with more perfect clearness. But it has been argued that a judicial construction has been given to an English Statute nearly similar, (29 Car. 2, *c.* 3,) according to which it is held by the courts there, that parol leases for an uncertain time, with the reservation of an annual rent, may be good as leases from year to year, notwithstanding the Statute. And it is said that the legislature here, in adopting the same language, must have intended to adopt the same construction. This argument would have weight, if the two Statutes were in all respects similar.

But there is an exception in the English Statute, in favor of parol leases not exceeding the term of three years, which was adopted here in the provincial St. 4 W. & M. The omission of it in the Statute now in force, shows plainly the intent of the legislature, to place all parol leases on the same footing.

It is a well settled rule, that when any Statute is revised, or one Act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. We are not therefore at liberty to suppose that the proviso or exception in the provincial Statute was omitted by mistake; and if not, then clearly it was the intention of the legislature, to place all parol demises on the same footing; for such is the obvious import of the language of the Statute of Frauds.

That the doctrine as to tenancies from year to year, depends upon the exception in the English Statute, appears to me very clear, although but little is to be found in the books on this point. In the case of *Legg* v. *Strudwick*, 1 Salk. 414, it was decided that a parol demise *habendum de anno in annum, et sic ultra, quamdiu ambabus partibus placeret*, was a lease for two years, and from year to year after; so that if the tenant holds on after the two years, he is not tenant at will, but for a year certain.

The court say, "that his holding on after the two years must be taken to be an agreement to the original contract, and in execution of it. And such an executory contract," they say, "is not void by the Statute of Frauds, though it be for more than three years: because there is no term for above two years ever subsisting at the same time." The plain inference is, that but for the exception in the Statute, the lease in that case would have been held a lease at will only. The doctrine, as to tenancies from year to year, was introduced long before the Statute of Frauds. In the case of *Doe* v. *Porter*, 3 D. & E. 16, Lord Kenyon says, "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the courts very early raised an implied contract for a year, and added, that the tenant could not be removed at the end of the year without receiving six months' previous notice." At first a lease without limitation of time, and with the reservation of an annual rent, was considered as a lease for a year certain. This was better than the old tenancy at will, but still inconvenient, because the tenant might be compelled to quit at the end of the year without notice. *Timmins* v. *Rowlinson*, 1 W. Bl. 533; s. c. 3 Burr. 1609. Then followed tenancies from year to year, which were found most convenient, as the estate could not be suddenly determined, nor without six months' notice to quit. Thus stood the law at the time the English Statute of Frauds was penned, and the exception was introduced, no doubt, for the purpose of supporting short parol leases, and tenancies from year to year depending on implied contracts. But whether this be so or not, it is very clear, that the English doctrine respecting tenancies from year to year can only be supported by the exception in the Statute, and that by our Statute there can be no tenancy from year to year, unless by a lease in writing. But the case under consideration, is not a case of tenancy from year to year, even according to the English doctrine. It is a case of a parol demise for a year certain; and in England, and in New York, where the law is the same, such a parol demise would be valid. If the tenant should hold over after the year, he would then be tenant from year to year, and would be entitled to notice.

If there be a lease for a year, and by consent of both parties, the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. The plaintiff therefore would not by the law of England be entitled to notice to quit.

Where a lease is determinable at a certain time, no notice to quit is necessary; because, says Lord Mansfield, both parties are equally apprised of the determination of the term. *Messenger* v. *Armstrong*, 1 D. & E. 54; *Bright* v. *Darby*, 1 D. & E. 162. All that is said therefore about tenancies from year to year, and the necessity of a notice to quit in every such tenancy, is not applicable to the present case.

2. The next question to be considered, is, whether a tenant at will is entitled to notice to quit.

I hold that he is not; and this is the principal objection to a tenancy at will. Notice to quit is frequently given, and is one way of determining the lease; but not the only one. It may be determined by the entry of the lessor on the land, and his exercising any act of ownership inconsistent with the nature of the estate; or by the death or outlawry of either landlord or tenant. And either party may determine the estate whenever he pleases.

This is clearly the law, notwithstanding the case of *Parker* v. *Constable*, 3 Wils. 25, which is a short and imperfect report. I presume that was a tenancy from year to year: for at the time it was decided (10 Geo. 3), the old tenancy at will had in England become obsolete. It existed only notionally, as Wilmot, J., said long before. If this is not a satisfactory explanation of that case, it is sufficient to add, that it is opposed to the whole current of the authorities. In the case of *Phillips* v. *Covert*, 7 Johns. Rep. 1, Kent, C. J., says, "that tenancies at will are held to be estates from year to year, merely for the sake of a notice to quit: as to every other purpose they are regarded as mere tenancies at will." And with this agree all the *dicta* of the English judges. Thompson, J., says that it has been settled in New York, that notice to quit is not necessary to a tenant at will. *Jackson* v. *Bryan*, 1 Johns. Rep. 323. And Spencer, J., says, that whether notice to quit in that case was necessary, depended on the question, whether the estate was a tenancy at will, or for years. Tomkins, J., it is true inclined to the opinion, that a tenant at will *is* entitled to notice to quit; and he relies on the case of *Parker* v. *Constable*, which he says he did not find had been overruled. And it ought not to be, if it is to be understood as I have supposed it might be. He refers also to the case of *Rigge* v. *Bell*, 5 D. & E. 471; but that case will not warrant the conclusion he seems to draw from it. Notice to quit was not held necessary in that case on the ground that the defendant was tenant at will, but because by the terms of the lease he was to hold for a time certain. It was a case of a parol demise for the term of seven years, which the court held void by the Statute of Frauds, as to the duration of the lease, but good as to the other terms of it. One of these terms was, that the defendant should quit at Candlemas, and the court decided, that if the lessor chose to determine the tenancy before the expiration of the seven years, he could only put an end to it at Candlemas. This was the only point decided in that case. In the case of *Jackson* v. *Laughhead*, 2 Johns. Rep. 75, it was decided by a majority of the court, against the opinion of Thompson, J., that in ejectment against a mortgagor, notice to quit was necessary. This was never held to be law in this State; nor is it the law of England.

Lord Mansfield says, in the case of *Keech* v. *Hall*, Doug. 21, that "when the mortgagor is left in possession, the true inference to be drawn, is, an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit." The same doctrine is laid down by Lord Ellenborough in the case of

Thunder v. *Belcher*, 3 East, 449; and such I think is unquestionably the law. A mortgagor is not entitled to emblements, much less to six months' notice to quit.

It appears, therefore, from a review of all the authorities, that an estate at will may be determined without previous notice; that the inconvenience arising from this principle of the common law, led in England to the introduction of the tenancy from year to year; and that notice to quit, as practised there, is required only in relation to the latter estate.

3. The question then is, whether, when an estate is determined by the lessor, the lessee is obliged immediately to quit, or may be forcibly expelled.

We are all of opinion that the law does not impose on the lessee these hard terms.

The lessee is entitled to the emblements, and a reasonable time is allowed to him for the purpose of removing his family, furniture, and other property. If the lessor disturbs him in the exercise of this right, an action will lie for the lessee. This principle was recognized in the case of *Rising* v. *Stannard*, 17 Mass. Rep. 287, and is well established. A contrary doctrine would be extremely harsh and unreasonable.

4. Nothing further then remains to be considered, except the question, whether there was, in this case, sufficient and reasonable time allowed the tenant to remove: and this we have found to be a question of no small difficulty. There being no rule established, each case must depend on its own peculiar circumstances. This, to say the least of it, is inconvenient. No right which is capable of being defined and limited, ought ever to depend on the discretion of the judges; the exercise of which necessarily leads to uncertainty, which is commonly productive of more difficulty than even the operation of a bad rule. It is for this reason that the court adopts rules of practice, instead of exercising its discretion in each particular case.

We shall hereafter probably find it necessary to frame some rule applicable to cases of this sort; should we not be prevented by the intervention of the legislature, whose unlimited power to change and modify the law would enable them most effectually to provide a remedy for existing inconveniences and difficulties. These probably were not foreseen when the provincial Statute was revised; and perhaps the operation of the exception or proviso in that Statute was not well understood or considered. At that time the doctrine of leases and tenancies at will was not familiar in practice, and the exception itself is somewhat obscure.

This case, however, must be decided by the law as it now is; and a majority of the court think that a reasonable time was not given to the tenant to remove, and that for this reason a new trial must be granted. What will be the opinion of the court after another trial cannot be now determined. On a fuller report of the case on this point, perhaps the

court may be of opinion that time enough was allowed. This must depend on the circumstances of the case, which do not at present sufficiently appear by the report.

New trial granted.[1]

ANDERSON *v.* PRINDLE.

COURT OF ERRORS OF NEW YORK. 1840.

[*Reported* 23 *Wend.* 616.]

ERROR from the Supreme Court. Anderson agreed to let certain premises to Prindle for the term of one year and eight months, at a certain rent, to be paid *monthly* — written leases *to be* executed. On the 1st September, 1835, Prindle entered, and then refused to execute a counterpart of the lease, which was tendered to him. On 17th June, 1836, the landlord made an affidavit stating the above facts, and also that Prindle had paid *the monthly rent* from time to time up to 1st June, 1836, and that *notice to quit* within thirty days had been served on Prindle on the *fourth day of April*, upon which affidavit Anderson obtained a summons from a judge of the Washington C. P. requiring Prindle to show cause why he should not yield up the possession. The case was tried before a jury, and the judge expressed his opinion that the acceptance of rent after the notice to quit *was not any evidence of waiver*, but submitted the question to the jury, who found a verdict in favor of the landlord. The tenant sued out a *certiorari*, and the Supreme Court *reversed* the proceedings. See 19 Wendell, 391 *et seq.* The landlord then removed the record into this court by writ of error.

L. H. Palmer, for the plaintiff in error.

S. Stevens, for the defendant in error.

BY THE CHANCELLOR. This is a writ of error to the Supreme Court to reverse a judgment given upon *certiorari* directed to a judge of the Court of Common Pleas, to review the proceedings had before him under the article of the Revised Statutes relative to *summary proceedings* to recover the possession of land. 2 R. S. 511. I do not concur in the opinion expressed by the learned judge who gave the reasons for the decision of the court below, that the court of which he was a member had no authority to examine the correctness of the decisions of the judge before whom the proceedings were instituted, upon questions of law which arose and were decided in the course of such proceedings. The attention of the Supreme Court had not probably been directed to the fact that their powers in this case were not restricted to what

[1] Jackson and Piersall, JJ., were of opinion that notice to quit was necessary. The opinion of Mr. Justice Putnam is given in a note to *Clapp* v. *Lord*, 2 Pick. 70, 71. As to the law in Maine, see *Jones* v. *Thompson*, 13 Me. 209; *Young* v. *Young*, 36 Me. 133; *Wilson* v. *Lancaster*, 48 Me. 370; *Eda* v. *Eaton*, 50 Me. 325.

the common law gave to that court upon an ordinary *certiorari* to correct the proceedings of an inferior tribunal. The forty-seventh section of the article of the Revised Statutes under which this proceeding was instituted, 2 R. S. 516, gives to the Supreme Court authority to award a *certiorari* for the purpose of examining *any adjudication* made on an application under that article; and the next section authorizes the court to award costs upon the *reversal* or quashing of such proceedings, and of course the adverse party will also be entitled to his costs if he succeeds in sustaining the decision of the judge *a quo*, under the general provision of the Revised Statutes giving costs to the defendant where the plaintiff would have recovered costs if he had obtained a judgment in his favor in any suit or proceeding. 2 R. S. 605, § 16. It is evident, therefore, that the legislature did not intend in these cases to limit the powers of the court, as in the case of a *certiorari at common law*, to the mere questions of the jurisdiction of the inferior tribunal, and the regularity of its proceedings; but that, on the contrary, they intended to give to the Supreme Court full and competent power to examine, upon the merits, every decision of the judge *a quo*, upon a question of law, and to affirm, reverse, or quash the proceedings, as justice should require; and also to award costs to the prevailing party, which they are not authorized to do upon a mere common law *certiorari*. The power to review the adjudications of the inferior tribunal on the merits, upon *certiorari*, gives to the appellate court, as a necessary incident to the proper exercise of that power, the right to require the inferior tribunal to return upon the *certiorari* such parts of the proceedings as are material to the examination of the case upon its merits. If it was erroneous, therefore, for the judge to tell the jury, that the acceptance of rent which accrued subsequent to the time of the termination of the tenancy specified in the notice to quit, was no evidence of a waiver of such notice, the Supreme Court was authorized to reverse the adjudication upon that ground alone.

I think the affidavit upon which the proceedings were instituted did not show a case of mere tenancy at sufferance or at will, but a holding from month to month. It appears by the affidavit that Prindle went into possession under an agreement for a written lease, for the term of one year and eight months from the first of September, 1835, and that a few days after he entered into possession he violated the agreement by refusing to accept the lease and execute the counterpart thereof. By that act he became a mere tenant at will or by sufferance, and liable to be ejected immediately. *Hegan* v. *Johnson*, 1 Taunt. 149. And he would have continued so, if Anderson had not changed the character of that tortious holding by receiving rent from him, subsequent to that time, from month to month, at the rate specified in the verbal agreement for a lease. Had it been competent for the owner of land to make a verbal lease for a longer period than one year, under the provisions of the Revised Statutes, this acceptance of rent by the landlord, at the rate specified in the original agreement for a written lease, would

probably be construed to have been a waiver of the agreement to execute a written lease and counterpart thereof, and to convert the contract into a verbal agreement for a lease for the same period and at the same rent. But as such an agreement would not be valid, the legal construction of the acts of the parties, in accepting and paying rent monthly, was to create a tenancy from month to month, commencing on the first of September, 1835. The tenant was therefore entitled to a month's notice to quit at the end of some month from the commencement of the tenancy. A notice served on the fourth of April, to quit at the expiration of thirty days, or *within* thirty days, was not sufficient. It is well settled, that where there is a tenancy from year to year, a notice to quit at the expiration of six months is not sufficient, unless that time corresponds with the commencement of the tenancy, so as to terminate a yearly holding. Where the tenancy is from week to week or from month to month, a week's or month's notice to quit must be given. And in analogy to the notice in the case of a yearly holding, it must be given in reference to the commencement of the tenancy. *Doe ex dem. Parry* v. *Hazell*, 1 Esp. R. 94. Here the tenancy from month to month commenced on the first of September. The notice to quit, therefore, if intended for the first of May, should have been served on or before the first of April; and if intended for the first of June, it should have required the tenant to quit at that time, and not within thirty days after service of the notice. No regular notice to quit having been given, there was still a subsisting tenancy from month to month, at the time of the commencement of these summary proceedings to turn the tenant out of possession. It is wholly unnecessary, therefore, to consider the effect of the receipt of rent for the month of May, 1836, as a waiver of the previous notice which had been thus irregularly given.

For these reasons the summary proceedings to turn the tenant out of possession were unauthorized and erroneous: and the judgment of the Supreme Court, reversing the decision of Judge Wait, and awarding restitution, should be affirmed.

The judgment of the Supreme Court was accordingly *affirmed*, by a vote of 12 for affirmance, 3 for reversal.

CONWAY *v.* STARKWEATHER.

SUPREME COURT OF NEW YORK. 1845.

[*Reported* 1 *Denio*, 113.]

ERROR to the Recorder's Court of Buffalo. Conway brought replevin against Starkweather and Brown in the court below; and the case was this: In April, 1838, the defendants Starkweather and Brown, by a written lease, demised a house in Buffalo to the plaintiff Conway for

the term of one year from the first day of May following, at the annual rent of $300, payable quarterly in advance. The plaintiff entered and held under the lease. In April, 1839, the parties, by a writing indorsed on the lease, continued the term for one year longer; and in April, 1840, they, by a like agreement, continued the lease for the term of two years from the first day of May then next: and they further agreed, that if the defendants should not require the premises for the purpose of building thereon, the plaintiff should have the preference over any other applicant for a further lease for one year or longer, "upon terms which may then be agreed upon." The term for which the last renewal was made expired on the first day of May, 1842. The plaintiff continued to hold and occupy the premises until the 14th day of that month, when he removed his goods from the building: and on the same day the defendants distrained for $75, a quarter's rent: and the plaintiff brought this action of replevin.

The plaintiff offered to prove that "in the latter part of April, and before the first day of May, 1842," the defendant Brown requested one Morehead to call on the plaintiff, and see if he would not continue to hold the house another year; and he directed Morehead to tell the plaintiff that if he would stay in the house another year, the defendants would reduce the rent to $250; that Morehead called on the plaintiff, who declined the proposition, because he had hired a building of Judge Bennett. After this answer had been communicated to Brown, he requested Morehead to call again on the plaintiff and say to him, that in addition to reducing the rent to $250, the plaintiff might expend fifty dollars of the rent on the premises: that Morehead made the communication, and the plaintiff again refused to take the house upon any terms, because he had hired a house of Judge Bennett. This refusal was also communicated to Brown. The defendants objected to this evidence, unless it was proposed to follow it up by evidence showing some new agreement. The recorder rejected the evidence, and the plaintiff excepted. Under the charge of the recorder, the jury found a verdict for the defendants, and judgment having been perfected in their favor, the plaintiff now brings error.

M. Fillmore, for the plaintiff in error.

J. L. Talcott, for the defendants in error.

By the Court. (Bronson, C. J.) When a tenant under a demise for a year or more, holds over after the end of his term, without any new agreement with the landlord, he may be treated as a tenant from year to year, and in all other respects as holding upon the terms of the original lease. The landlord has an election to treat him either as a trespasser, or as a tenant. He will be a trespasser if the landlord brings ejectment, or resorts to summary proceedings under the Statute to recover the possession. He will be a tenant if the landlord either receives or distrains for rent accruing after the end of the original term. There are also other ways in which the landlord may signify his assent to the tenancy; and when he neither says nor does anything, his

acquiescence in the tenancy may, perhaps, be inferred from the mere lapse of time. *Rowan* v. *Lytle*, 11 Wendell, 616. There is, however, no occasion for considering that point in this case; for the landlords have unequivocally affirmed the tenancy by distraining for rent.

The tenant has no such election as that which belongs to the landlord. If he holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterwards at liberty to deny that he is in as a tenant, if the landlord chooses to hold him to that relation. If the tenant may hold over for two weeks and then say he is not a tenant, I see no reason why he may not give the same answer after holding over as many months or years.

The plaintiff's counsel regards the holding over as only presumptive evidence of the continuance of the tenancy, which would have been sufficiently rebutted by the offered proof that the plaintiff, before his term ended, refused to keep the property another year, even at a reduced rent. But such are not my views. I do not think this a case for balancing presumptions: but one where the act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant: and that it is not in his power to throw off that character, however onerous it may be. The counsel relied much upon the case of *Abel* v. *Radcliff*, 15 John. 505. The question there was whether the landlord was concluded by the terms of the original lease as to the amount of the rent; and under very special circumstances, and by a divided court, it was held that he was not. The case has very little bearing upon the question under consideration.

We think the offered evidence was properly rejected. The defendants had a clear right to charge the plaintiff as tenant, holding according to the terms of the original lease. By those terms, the rent was payable quarterly in advance; and there was consequently a right to distrain, although the first quarter had not expired.

Judgment affirmed.[1]

BARLOW *v.* WAINWRIGHT.

SUPREME COURT OF VERMONT. 1849.

[*Reported* 22 Vt. 88.]

ASSUMPSIT for the use and occupation of a store in Burlington. Plea, the general issue, and trial by the court, September Term, 1847, — *Bennett*, J., presiding.

It appeared on trial, that the plaintiff was the owner of the store in question, and that the defendant, on the twenty-second day of July, 1841, hired it of the plaintiff, by parol agreement, for the term of five

[1] See *contra*, *Angle* v. *Smith*, 31 N. Y. 309; *Tolle* v. *Orth*, 75 Ind. 298; *Wolfe* v. *Wolf*, 69 Ala. 349.

years, commencing from the first day of April, 1841, at an annual rent of $125.00, one half payable on the first day of April and the residue on the first day of October in each year; that the defendant took possession of the store, under that agreement, and remained from two to four months, one Carlos Wainwright having charge of the store as his agent; that the defendant then formed a co-partnership with one Alonzo A. Wainwright, under the firm of E. & A. A. Wainwright, and the firm occupied the store for about two years, the rent being paid from the funds of the firm, during that time, by Carlos Wainwright, who still continued to have charge of the store, — but there was no evidence of any new agreement having been made between the plaintiff and the firm of E. & A. A. Wainwright in reference to the store; that then the firm of E. & A. A. Wainwright was dissolved, and the business at the store passed again into the hands of the defendant, and he occupied the store, without any new agreement, at the same rent, until the twenty-first or twenty-second day of July, 1844; that the defendant then left the store, and, on the twenty-second day of July, 1844, tendered to the plaintiff the possession and the key, and paid all the rent due to that day, but nothing beyond it, at the rate of $125 per year; and that the plaintiff then declined to receive the possession of the store, and it remained vacant from that time until the twenty-eighth of November, 1844, when the plaintiff leased it, at a rent of $135.00 per year, to another person, who went into the possession. It appeared, that during all the time the store was occupied as above stated, the rent had been paid semi-annually, on the first days in April and October in each year.

Upon these facts the plaintiff claimed to recover the rent of the store from the twenty-second day of July to the twenty-eighth day of November, 1844, during which period the store had remained vacant. The court decided, that the plaintiff was entitled to recover the rent from the twenty-second day of July to the first day of October, 1844, at the rate of $125 per year, and rendered judgment accordingly. Exceptions by defendant.

Smalley and *Phelps*, for defendant.

C. Russell, for plaintiff.

The opinion of the court was delivered by

Bennett, J. It seems from the bill of exceptions, that the defendant hired of the plaintiff his store, by a verbal contract, for the period of five years from the first of April, 1841, at an annual rent of one hundred and twenty-five dollars, payable semi-annually, on the first days of April and October in each year, and that the defendant went into possession, under the parol agreement, and the occupancy was continued until the twenty-first or twenty-second of July, 1844, when the defendant quit the possession of the store, and offered to give up the key and the possession to the plaintiff, which the plaintiff then declined to receive. The store remained vacant until the twenty-eighth of November, 1844, when the plaintiff leased it to another person, at an

increased rent of ten dollars, who went into possession under his lease. The case further finds, that the rent had been semi-annually paid, on the first days of April and October, until the time when the defendant quit the possession in July, 1844. The County Court held, that the plaintiff should recover that portion of the half year's rent, falling due the first of October, 1844, which had not been paid; to which the defendant excepted.

Though in the court below the plaintiff claimed to recover rent to the time, when he took possession by his tenant, that is, to the twenty-eighth of November, 1844, yet there is no exception on his part; and the County Court, in disallowing the rent to the extent claimed, probably proceeded upon the ground, that the rent could not be *apportioned*. The correctness or incorrectness of such an opinion we are not now called upon to revise.

The only question now is, has the defendant any ground, upon which he can assign error. We think not. It is true, the Revised Statutes, chap. 60, § 21, declare, that all interests or estates in lands, created without any instrument in writing, shall have the force and effect of estates at will *only*; yet we think, that this estate, when once created, may, like any other estate *at will*, by subsequent events, be changed into a tenancy from year to year. In the case before us the lessee entered into possession, and the possession was continued from year to year, until July, 1844, and the rents semi-annually paid by the lessee and accepted by the landlord. From these facts a new agreement may well be presumed, and the estate, which was originally created by the Statute as an estate *only at will*, expands into a holding from year to year.

This is the settled doctrine of the English courts, under their Statute of Frauds, which enacts, that all parol leases of land shall have the force and effect of leases or estates *at will only*. See *Riggs* v. *Bull*, 5 T. R. 471. *Clayton* v. *Blakey*, 8 T. R. 3. *Doe* v. *Walker*, 7 T. R. 478. *Roe* v. *Rees*, 2 Bl. R. 1171. See, also, 2 Cow. 660, and 8 Cow. 227, in which the courts of New York declared the law of that State to be the same. We think the words of our Statute are satisfied by holding, that, *in the first instance*, the estate created in the present case was an estate at will, and only an estate at will, yet that it should inure, like other estates at will, and have the incidents common to an estate at will, one of which is its *convertibility* into a holding from year to year by the payment of rent. To go farther, and hold, that the estate, created under the Statute as an *estate at will*, must ever remain such, would be to go beyond the Statute, and evidently contravene its provisions, rather than obey them. The expression in the Statute, "shall have the force and effect of estates at will only," evidently implies, as we think, that they should in every respect inure as a lease at will.

This question is not altogether new in this State. In the case of *Hinchet* v. *Whitney*, 2 Aik. 240, it was held, that an estate at will

created, under the Statute then in force, by means of a parol lease, having run for a period of five years, was converted into a tenancy from year to year. The provision of the Statute of 1797, then in force, was in effect the same as our present Statute.

We do not discover, that the sixth section of chapter 60 of the Revised Statutes, page 312, to which the court have been referred, has any special bearing upon the question. The provision in that section, that any lease for more than one year shall not be good and effectual against any other person than the lessor and his heirs, unless the same has been acknowledged and recorded, answers to a like provision in the fifth section of the Statute of 1797. The provisions of the Statute are the same as to deeds which remain unacknowledged and unrecorded.

I am aware, that in Massachusetts, in the case of *Ellis* v. *Paige et al.*, 1 Pick. 43, and in *Hollis* v. *Pool*, 3 Met. 551, it was held, that under their Statute of 1793 a person entering under a *parol* lease for any certain time shall not, even after occupation and payment of rent, be treated as a tenant from year to year, but shall at all times be regarded as a tenant at will. The Statute of Massachusetts is very similar in its phraseology to our Statute of 1797. It enacts, that parol leases shall have the effect of leases or estates *at will only*, and shall not, at law or equity, be deemed or taken to have any other or greater force and effect. Though the Statute of that State, as well as the Statute of this State, is decisive against the creation of a tenancy from year to year in the first instance, yet I do not see, how the reasoning of the court in those cases applies against the growth of an estate at will, created under the Statute, into a tenancy from year to year.

It is true, the English Statute of Frauds has an exception, as to leases not exceeding the term of three years; and this is dwelt upon by the court of Massachusetts, as a reason why the decisions of the courts in England, under their Statute, should not furnish a rule for them. I must confess, that I do not see the force of the reasoning of the court, which would prevent an estate at will from being turned into a tenancy from year to year in Massachusetts, and allow it under the English Statute. In the case of *Hanchet* v. *Whitney* it was not supposed, that our Statute of 1797 would have any other or greater effect, than the English Statute, and that both alike, in the first instance, declared that the estate created by a verbal lease was only an estate at will, unless it came within the exception of the English Statute, and that under our Statute it might be turned into a tenancy from year to year, as well as in England. The court of Maine, in the case of *Davis* v. *Thompson*, 13 Maine, 214, under a similar Statute, have followed the Massachusetts cases; but no new views of the question are presented, and for myself I cannot coincide with those cases.

It is said by Tindal, C. J., in 7 Bing. 458, that "if a party enters and pays rent, a new agreement may be presumed," and that this is the ground of turning the tenancy into a holding from year to year. See, also, *Cox* v. *Bent*, 5 Bing. 185. In such case the tenant is entitled to

six months' notice, ending with the expiration of the year; and without this the landlord cannot eject him. From this it should follow, that the defendant could not, at any time during the year, at pleasure, surrender the premises against the will of his landlord, and thus excuse himself from the payment of accruing rent.

But suppose we regard the continuing interest of the defendant in the store to be still only that of a tenant at will, does it follow, that the defendant could have the right at any time, *without previous notice*, to determine his estate, and thus excuse himself from all liability to accruing rents? And could he especially do it in this case, at least, until the six months' rent, to become due the first of October, 1844, had fully accrued? He had seen fit to hold over after the first of April, 1844, and could he determine his estate, while the next six months were running, and thereby acquire the right to apportion the six months' rent then accruing? But for myself I do not deem it important to recur to this ground. I am fully satisfied to treat it as a tenancy from year to year.

It is no defence in this case, that the defendant abandoned the possession of the store. If the tenancy remained undetermined, he is liable for rent, whether he in fact occupied the store, or not. 3 Steph. N. P. 2724. *Redpath* v. *Roberts*, 3 Esp. R. 225. The plaintiff, however, cannot claim rent from this defendant after his lease of the twenty-eighth of November, 1844; and the County Court limited his right to recover rent ending with the six months' rent due the first of October, 1844, and this, no doubt, upon the ground, that the plaintiff could not determine the tenancy, while the next six months were running, and thus acquire the right of *apportionment*. The plaintiff re-possessed himself of the store by and through his new tenant.

The fact, that the defendant, after having been in possession a few months, took a partner in the business carried on in the store, cannot alter the case. No new agreement was made, in relation to the occupancy of the store, with the plaintiff. The partner of the defendant might well be considered, for the time being, as in under him, at least, as a *quasi* tenant. Besides it appears, that after about two years the partners dissolved their connection, and the store was again occupied by the defendant individually.

We then think, the court below were right in their view of the law, and that, although the contract was modified, yet it was not entirely destroyed, and should govern the rights of the parties, as to the amount of rent, and the times when the same became payable. See *Schuyler* v. *Leggett*, 2 Cow. 660.

The result is, the judgment of the County Court is *affirmed*.[1]

[1] See *Hunnewell* v. *Douglass*, 50 Me. 434.

CURTIS *v.* GALVIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[*Reported* 1 *Allen*, 215.]

TORT for entering the plaintiff's dwelling-house, and removing his furniture and ejecting his family therefrom. The defendants proved, in justification, that the defendant Galvin, being the owner of the premises, conveyed them by deed to the other defendant Carney, and that, eight days before the acts complained of, Carney informed the plaintiff thereof, and gave him notice to quit. At the trial in the Superior Court, *Rockwell*, J., directed a nonsuit, and the plaintiff alleged exceptions. The facts appear more fully in the opinion.

B. F. Butler and *W. P. Webster*, for the plaintiff.

A. V. Lynde, for the defendants.

BIGELOW, C. J. It appears by the testimony of the plaintiff that, in October, 1858, prior to the alleged trespass, the premises from which he was ejected belonged to Galvin. Inasmuch as he offered no evidence of any right to their occupation created by an instrument in writing, he could have no greater title or interest therein than an estate at will. Rev. Sts. *c.* 59, § 29. On the facts stated in the exceptions, this is the most favorable view which can be taken of his right to the possession and enjoyment of the premises, prior to the conveyance to the defendant Carney. But, on a familiar and well-settled rule of law, this tenancy at will was determined, and the plaintiff became a tenant by sufferance only by the conveyance from Galvin to Carney, the other defendant, on the 9th of said October. *Howard* v. *Merriam*, 5 Cush. 563, 574; *McFarland* v. *Chase*, 7 Gray, 462.

The evidence offered by the plaintiff to impeach this conveyance, and to show that it was colorable, and was in fact made for the purpose of enabling the said Galvin to eject the plaintiff from the premises, was rightly rejected. The deed was a valid one as between the parties. It passed the title to the premises. The grantor had no power to compel the grantee to surrender the estate conveyed to him. It violated the legal rights of no person. It is true that a creditor of the grantor, who could show that he was thereby hindered, delayed and defrauded of the collection of his debt, or a subsequent purchaser without notice, who could prove that the deed was made with intent to defraud him, might impeach the conveyance, and set it aside on the well-settled principles of the common law as declared in Sts. 13 Eliz. *c.* 5, § 2, and 27 Eliz. *c.* 4, § 2. But in such case the deed is valid between the parties; and, with this exception, we know of no rule of law which restrains the owner in fee from the free and unfettered alienation of his estate. It is only an exercise of a legal right, which works no injury to any one, least of all to a person who holds under the grantor. He took his estate or interest

in the premises subject to all the legal rights of the owner therein, and must be presumed to have known them, and to have assented thereto. To him, therefore, the maxim *volenti non fit injuria* is applicable. The determination of an estate at will, by an alienation by the owner of the reversion, is one of the legal incidents of such an estate, to which the right of the lessee therein is subject, and by which it may be as effectually terminated as by a notice to quit given according to the requisitions of the Statute. Indeed it is difficult to see upon what ground a deed can be held void, as being colorable or fraudulent, which is made in the exercise of a legal right, and which has no effect on the rights of a third party, who seeks to set it aside, other than that which was necessarily incident to the estate which he held in the premises. The *dictum* of the court in *Howard* v. *Merriam*, *ubi supra*, cited by the counsel for the plaintiff, was not essential to the decision of that case, and cannot be supported on principle or authority.

It follows that, after the conveyance of the demised premises, the plaintiff became tenant by sufferance only, and could not maintain this action of tort in the nature of trespass *quare clausum* against the defendant Carney, who was the grantee in the deed; nor against the other defendant, who acted under his authority in attempting to eject the plaintiff from the premises. At the time of action brought, it was not the plaintiff's close. A tenant by sufferance holds possession wrongfully. Co. Lit. 57 b, 271 a. The defendants had a full right of entry. *Meader* v. *Stone*, 7 Met. 147.

Exceptions overruled.[1]

CLARK *v.* WHEELOCK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported* 99 *Mass.* 14.]

ACTION on the Gen. Sts. c. 137, for possession of a dwelling-house and land in Cambridgeport. Writ dated May 24, 1866. At the trial in the Superior Court, before *Vose*, J., without a jury, on appeal from the Police Court of Cambridge, the judge found these facts: —

The plaintiff claimed under a written lease of the premises to him from John Leishman, their owner, dated May 1, 1866, for one year from that date. For the four years preceding, Francis B. Kern had hired the premises from Leishman by an oral agreement, had paid rent to May 1, 1866; and at some time during the four years had underlet the premises, by an oral agreement, to the defendant, who on May 1 was in occupation of them. After that date neither Kern nor the defendant paid to the plaintiff any rent. On May 12 the plaintiff served on the defendant a written notice of his lease from Leishman, and to quit the premises forthwith; but no notice in any form was given to Kern.

[1] See *Pratt* v. *Farrar*, 10 Allen, 519.

On these facts the judge ordered judgment for the plaintiff; and the defendant alleged exceptions.

S. E. D. Currier, for the defendant.

S. Albee, for the plaintiff.

GRAY, J. Upon the view of this case most favorable to the defendant, his exceptions cannot be sustained. As Kern was but a tenant at will, and his verbal lease and surrender of possession to Wheelock included all his interest in the premises, it would seem that his tenancy at will was at an end as soon as his transfer became known to his landlord, the owner of the land, unless the latter saw fit to recognize Wheelock as his tenant. *Chandler* v. *Thurston*, 10 Pick. 209; *Cooper* v. *Adams*, 6 Cush. 90, 91. But if any tenancy at will existed after such transfer, either in Kern or Wheelock, it was terminated by the subsequent lease for years from the owner; and the utmost notice of this alienation which could be required to give it effect, and to authorize the maintenance of this process, would be a reasonable notice to the occupant of the estate to enable him to remove himself and his effects. Kern having surrendered the occupation to Wheelock, notice to the latter would affect both him and Kern; and the twelve days allowed, after the written notice to Wheelock, before bringing this action, were more than sufficient. *Pratt* v. *Farrar*, 10 Allen, 519, and cases cited; *Alexander* v. *Carew*, 13 Allen, 70.

Exceptions overruled.

STEFFENS *v.* EARL.

SUPREME COURT OF NEW JERSEY. 1878.

[*Reported* 11 *Vroom*, 128.]

ON *certiorari*.

This writ brings up the proceedings to eject Henry Steffens, a tenant, brought by John W. Earl, the landlord, taken in supposed conformity with that portion of the Act constituting District Courts in certain cities in the State, which confers jurisdiction upon such courts over summary proceedings for the recovery of possession of rented premises. District Court Act, § 123, Pamph. L., 1877; Rev. p. 1300.

The portion of the affidavit of the landlord upon which questions are now raised, is as follows: "That in the month of April, in the year 1877, deponent leased said premises to said Steffens by the month, to commence on the 1st day of May last, at the monthly rent of $10; that, in pursuance of said agreement, said Henry Steffens entered into possession of said premises on or about the said 1st day of May, in the year 1877; that in the month of May aforesaid, said Steffens paid this deponent $10 for the rent of said premises for the month commencing on the 1st day of May and ending on the 1st day of June last; that in the month of June last, said Henry Steffens paid to the deponent the

sum of $10 for the rent of said premises from the 1st day of June to the 1st day of July last; and deponent says that on the 29th day of June, A. D. 1877, he made demand and gave notice in writing to the said Henry Steffens to deliver to him the possession of the said premises, on the 1st day of August, A. D. 1877."

The court found as proven, at the trial, the following as matters of fact: —

That the defendant applied to the plaintiff, on a Sunday in April, 1877, to lease to defendant the premises in Jersey City, and they orally agreed that the plaintiff should lease the premises to the defendant from May 1st, 1877, for the rent of $10 a month, payable in advance; that the defendant should pay the rent to plaintiff, and that the agreement should take effect when defendant paid the money.

That defendant, May 1st, 1877, paid to plaintiff's wife, at the residence of plaintiff, $10; received from her the key of the premises, and entered into possession of the premises and occupied them from May 1st, 1877.

That at the time of the application by the defendant to plaintiff, in April, the latter stated that he might sell the premises, and in that case would require possession of them, but it was not part of the agreement between them that the term of the lease should be until the plaintiff should sell; that such statement was made as a reason why the plaintiff rented by the month. It was also, at that time, stated that defendant could leave when he chose, which statement was an expression by the parties of the effect of the lease by the month.

That on June 1st, 1877, plaintiff refused to receive the rent for June offered to him by defendant, and told defendant he, plaintiff, might sell, and defendant might have a new landlord. The plaintiff told the defendant he, the plaintiff, did not recognize him as a tenant. June 29th, 1877, plaintiff received from defendant $10, the rent for June, and, at the same time, made demand and gave notice in writing to defendant to quit the premises, and deliver possession of them to plaintiff on the 1st of August, 1877.

On the 1st of August, 1877, between the hours of five and six in the afternoon, the plaintiff, at the premises, orally demanded possession of them of defendant, and informed him, defendant, that he did not recognize him as tenant, and received from defendant, at the same time, $6 on account of the rent for July. Defendant refused to surrender possession, and continued, and still continues to occupy the premises, without consent of plaintiff.

That $4, the balance of rent for July, were sent in August by defendant to the wife of plaintiff, without the knowledge of the plaintiff.

That August 1st, 1877, was the day on which the period of a month's tenancy expired; that the term of defendant, as tenant, expired August 1st, 1877, and he holds over and still continues in possession of the demised premises after the expiration of his term, and after demand made, and notice in writing given for delivering the possession thereof by the plaintiff, his landlord.

That the agreement made on Sunday, in April, was subsequently ratified by the parties, and that the facts which, by the Statute, authorize the removal of a tenant, are proved to the satisfaction of the court.

Judgment was rendered in favor of the landlord.

Argued at November Term, 1877, before SCUDDER, DIXON, and REED, J.J.

For the prosecutor, *W. J. Lyon*.

For the defendant, *R. B. Seymour*.

The opinion of the court was delivered by

REED, J. The first objection urged against the judgment in this case is relative to the statement in the affidavit of the existence of the tenure. The statement in the affidavit is that "deponent leased said premises to said Steffens by the month, to commence on the 1st of May last, at the monthly rent of $10." It is said that this is merely the statement of a conclusion of law, and not a statement of such facts as will disclose to the court the existence of a tenancy, as a legal conclusion. In support of this position, the case of *Fowler* v. *Roe*, 1 Dutcher, 549, is adduced. In that case, the statement in the affidavit was that the defendant was "her tenant," and held over premises "heretofore leased to him;" and it was held insufficient, because it was the claimant's conclusions from facts not disclosed. I do not perceive in what manner this affidavit is invalidated by the rule in that case, which was merely an assertion of the general rule that in pleadings and complaints analogous thereto, upon which judicial action is to be grounded, statements of legal conclusions, without the facts upon which they are predicated, are vicious. How does it appear that this affidavit states a mere legal conclusion, and that there are undisclosed facts? If A. says to B., "I will let you have that house by the month, for $10 a month," and B. acquiesces and goes into possession, I think a statement that A. leased to B. by the month, at $10 a month, would sufficiently state the facts of the letting. The legal effect of a letting, by these words, is then determinable by the court. To require more than this would be laying down a rule more stringent than that in the case of *Brahn* v. *Jersey City Forge Co.*, 9 Vroom, 74. I think the affidavit is, in this respect, sufficient. It is also urged that the statement in the affidavit that "the said term has expired, and the said Steffens holds over," is also a conclusion of law merely, and so insufficient. But it is not the statement of legal conclusions which invalidates the affidavit, but the absence of a statement of the facts upon which such a conclusion can be grounded. The tenancy in this case is alleged to be terminated by notice. The renting, and the notice as to terms and time, are set out fully. If they support this conclusion, its statement as a conclusion does no harm, and if the facts fail to support it, its statement affords no assistance to the claimant.

What, then, in the first place, is the character of this tenancy, in respect to time?

To support the judgment in this case, it must be a monthly letting. The defendant insists that the words employed by the claimant, in the affidavit, import a tenancy at will, or from year to year, and therefore a three months' notice was requisite to determine the tenure. The question is important from the fact that, acting upon the supposition that the tenancy was monthly, only a month's notice was attempted by the claimant. Indeed, the distinction between tenancies from year to year and tenancies for a less period, in all the cases, seems to be important only in relation to the notice by which the determination of either kind can be effected. Unless it can be shown that monthly or weekly tenancies are unknown, I do not see how it is possible to hold the tenancy described in the affidavit to be other than a monthly tenancy. That such tenancies have an existence, the cases hereafter cited will establish, and to hold that the contract here shown is a monthly letting is only giving to the words of the affidavit their literal force. Further argument would be wasted upon this point.

If a monthly tenancy, is there a sufficient notice shown?

The rule relative to notices seems to be as follows: Where there is a lease for a certain period, the term determines without notice. *Cobb* v. *Stokes*, 8 East, 358; *Right* v. *Darby*, 1 Term R. 159; *Doker* v. *Adams*, 7 Halst. 99. In uncertain tenancies, reasonable notice was necessary, which reasonable notice had, from the time of Henry VIII., according to Lord Ellenborough, been six months. *Doe d. Strickland* v. *Spence*, 6 East, 120.

This rule was applied to all uncertain tenancies in this State, whether rent was or was not reserved. *Den* v. *Drake*, 2 Green, 523. The time was changed to three months by Act of 1840 (Pamph. L. p. 104), now, with a little change in the text, the twenty-seventh section of the Landlord and Tenant Act in the revision. Rev. p. 575.

In cases of tenancies for periods running less than a year, the rule enunciated by the text-writers is, that the notice must be regulated by the letting, and must be equivalent to a period. Taylor on Land. and Ten. § 478, Archb. on Land. and Ten. 87. How the rule arose is uncertain. It certainly did not have its origin in any resolution of the courts. Indeed, Baron Parke, in *Huffell* v. *Armistead*, 7 C. & P. 56, said that he knew of no decision holding a week's or month's notice was necessary to determine a weekly or monthly tenancy. See, also, the remarks of the judges, to the same import, in *Towne* v. *Campbell*, 3 C. B. 921.

It seems, however, to have very early shaped itself into a custom. The habit of giving and requiring reasonable notice, in cases of tenancies, not for a single term, but for recurring periods, which reasonable notice, when the periods were from year to year, was, according to Lord Ellenborough, very early held to be six months, was, probably by a custom equally as old, in tenancies for less periods, established as now stated by the books.

By strict relativeness, the rule of a half year's notice in tenancies

from year to year, would only require a half month's or a half-week's notice in cases of monthly or weekly tenancies. The briefness of the latter, and the length of the former kind of tenancies, was the probable reason why the rule was not uniform. Whatever the reason of the rule, it seems to have been well grounded in the general understanding of the English people. The cases cited by the books of authority in support of the rule already stated are merely recognitions of what was obviously a custom, and, as such, the cases would seem to have as much weight as authority as if they had expressly ruled the point.

The first is the case of *Doe d. Parry* v. *Hazell*, 1 Esp. 94. It was a case of ejectment, tried before Chief Justice Kenyon in 1794. The full report of the case is as follows: The defendant had taken the house by the month, and a month's notice to quit had been given. It was agreed that the notice had reference, in all cases, to the letting, and that a month's notice was sufficient to entitle the plaintiff to recover.

In *Peacock* v. *Raffan*, 6 Esp. 4, tried before Lord Ellenborough in 1808, the court remarked that a week's notice to quit was certainly sufficient where the holding was weekly.

In *Doe d. Campbell* v. *Scott*, 6 Bing. 362, the same rule was, in 1830, recognized by the Court of Common Pleas. The rule was incorporated in the text of the books of authority upon this subject as the law, and may be considered as settled both in England and in this country, excepting where the matter of notice has been the subject of statutory regulation. *Prindle* v. *Anderson*, 19 Wend. 391; s. c. 23 Id. 616; *Seem* v. *McLees*, 24 Ill. 192; *Walker* v. *Sharpe*, 14 Allen, 43.

The common law rule I take to be undoubted, that notice is necessary to determine a monthly or weekly renting, and that a month's or week's notice, respectively, is sufficient.

2d. It is said that the notice in this case is insufficient, because the day for quitting named in the notice was the first of August, and not the last day of July.

The point made is, that according to the statement of the affidavit, the term originally commenced on the 1st day of May, and, by the usual mode of computation, it determined on the last day of the month. So, throughout the tenancy, the recurring periods each terminated on the last day of each month. It is therefore urged that the notice was given to quit on a day subsequent to the last day of the term, and that then a new term had commenced to run, and that, therefore, the tenants holding must continue until determined by a new notice. Taylor on Land. and Ten. § 477.

It is true that the notice required to determine these tenancies must be given to quit at the end of a period. When a term has commenced without such notice, the tenant is entitled to remain during and bound to pay for the term.

A notice given to quit, in the middle of a term, is ineffectual. Archb. on Land. and Ten. 86; Taylor on Land. and Ten. § 476. But no case has been cited which supports the position of the prosecutor, or the

statement of Mr. Taylor in § 457 of his work. The cases in the State of Massachusetts are put upon the construction of their Statute concerning notices in cases of uncertain tenancy, with rent payable at designated intervals. *Walker* v. *Sharp*, *supra*.

The question whether the day mentioned in the letting is to be computed or not is frequently involved in cases of suits for trespass, and in actions in which the length of a notice is in question. In such instances, nice distinctions have been taken, relative to the language of the letting, whether the term is to commence "on," or "from," or "from the date," or "from the day of the date." *Wilcox* v. *Wood*, 9 Wend. 345; *Sheets* v. *Sheldon's Lessee*, 2 Wall. 177; *Pugh* v. *Duke of Leeds*, Cowper, 714.

If the notice was short by one day, in case the month's tenancy expired on the last day of July, or if an action of trespass was pending for the tenant's occupancy on the 1st day of August, the question of computation of the first day might be material. But no case, I think, can be found which holds that a notice to quit is invalid merely because it names, as the day to quit, a day which corresponds in date with the day named in the original letting, whatever the words of the letting.

In England, the letting was usually from and to certain feast-days, and the tenant usually entered and quit on those days, and the notices to quit named that day. In *Doe d. Eyre* v. *Lambly*, 2 Esp. 635, the tenant told the purchaser of the reversion that his tenancy commenced on Lady-day, and notice was given to quit on that day. No objection was raised on the ground that notice should have been given to quit on the preceding day, but it was attempted to show that the term actually commenced at another period, which was not allowed, on the ground that the tenant was estopped.

In *Kemp* v. *Derrett*, 3 Camp. 510, the defendant became tenant on the 29th of October, 1810. On that agreement, Lord Ellenborough held it to be a tenancy from three months to three months, and said that, therefore, a notice expiring at the end of any quarter from the time of entry would have been sufficient to determine the tenancy. He said that the notices should have expired on the 29th of January, or on the 29th of April, or on the 29th of July.

The following cases show that it was almost the uniform custom to name the day corresponding with the date of the letting and entry of the tenant, as the time for quitting, and in these cases no objection seems to have been raised to the sufficiency of the notices on that ground. *Rex* v. *Ward*, 1 H. Black. 97; *Doe* v. *Weller*, 7 Term R. 478; *Mills* v. *Goff*, 14 M. & W. 72; *Doe d. Cornwall* v. *Matthews*, 11 C. B. 675.

And in *Doe d. Finlayson* v. *Bayley*, 5 C. & P. 67, this seems to have been the idea of the court as to the notice in a weekly tenancy.

By strict computation, the term set out by the present affidavit probably terminated on the last midnight of July. I think it would be carrying the rule that a notice to quit must be made with reference to

the end of the term, to an illogical and unreasonable length to hold that a notice given for the day commencing at that midnight is not a good notice. The law is ignorant of fractions of a day. The notice covers all and any period of the twenty-four hours from midnight to midnight. The very moment the tenancy expires the tenant is confronted with a direction to quit. On what process of reasoning can it be said that a new term has commenced before notice is given?

There is another foundation which I think the landlord might have erected to support the validity of his notice, and that is usage. The bulk of the letting, in cities, is in connection with houses used for that purpose only. The constant interchange of tenants and tenements compels simultaneous moving. A strict construction of leases would often compel general movements at midnight. Of course, nothing so absurd is conceivable in practice. I am quite sure that a usage could be shown for the outgoing tenant to remove and the incoming tenant to enter on the same day, and that day corresponding with the first day of the various terms. Unless this usage was controlled by express words in the lease, the courts would enforce it. *Wilcox* v. *Wood*, *supra*.

Without regard to this, as it was not in evidence, I think the notice was sufficient.

In the third place, it is found by the court below, as a matter of fact, that the agreement for the monthly letting was made on Sunday. It was also found as a fact that the agreement was subsequently ratified by the parties. No subsequent contract, relative to the terms of the letting, appears in the case.

The doctrine enunciated in the case of *Butcher* v. *Reeves*, 2 Vroom, 224, was that no vitality could be imparted to a Sunday contract by ratification. Whether the words spoken on Sunday could be resorted to in any event for the purpose of showing the character of the tenancy, is very questionable.

Its determination is not essential, because, upon another fact shown in the case, I think, without any reference to the original contract, a tenancy by the month arises: and that fact is, that the payment of the rent was monthly. Where it appears that there is an annual rental reserved, and the payment is to be made by the quarter, or month, or week, then the renting is a yearly letting, without regard to the periods of payment. But where there is no such letting, and there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or weekly one, just as the payment is monthly or weekly. *Peacock* v. *Raffan*, *supra*; *Anderson* v. *Prindle*, *supra*, 23 Wend. 616; *Witt* v. *Mayor*, &c., *of New York*, 6 Rob. (N. Y.) 441.

Upon reaching this conclusion, it follows that the proceeding below must be affirmed, with costs.[1]

[1] "It appeared that the defendant had held the premises for many weeks at a weekly rent. It cannot be said that there was a new contract each week; it must have been a tenancy from week to week for so long as the parties should respectively

ground. If it had been a tenancy from year to year, it would have undoubtedly subsisted until it was terminated by a proper notice. The question is whether there is in that respect any difference in principle between a tenancy from week to week and a tenancy from year to year. I apprehend that in either case there must be a legal expression of intention that the tenancy should cease. There certainly is no direct authority upon the subject: but, upon principle, I do not see how a party holding on the terms that his tenancy should continue until his landlord evinced an intention that it should cease, can be turned out of possession without any notice at all. . . . How long the notice should be, it is unnecessary upon this occasion to determine, inasmuch as none was given. But the inclination of my opinion is, that, where the holding is from week to week, a week's notice should be given, and a month's notice where the holding is from month to month." — *Per* WILLIAMS, J., in *Jones* v. *Mills*, 10 C. B. N. S. 788, 798.

"Upon the question of disclaimer, I have nothing to add. As to the other point, I can quite understand that the law may be as laid down by my Lord and my Brother Williams; and, as they think so, and my Brother Byles also, I believe, I have no doubt that the inference of law arising from a contract of tenancy like this, is, that it should continue from week to week until put an end to by the one party or the other expressing his dissent to its continuance, and that such dissent cannot be so expressed as to put an end to the tenancy before the end of the current week. I am ready to adopt that view: but, to say, as matter of law, that a week's notice is necessary, is a proposition which I am not prepared to assent to. It is clear that, in contemplation of law, a lease for a week stands upon precisely the same footing as a lease for a year or any number of years. Whether it be for a week or for one or more years, such a lease would come to an end at the expiration of the term. That is the general rule. An exception has been made in the case of a tenancy from year to year, — a peculiar tenancy which grew out of the tenancy at will. The judges, seeing the inconvenience of so uncertain a holding, and that the tenant was usually entitled to emblements, very early adopted the inference that it was intended that the tenancy should be a tenancy to be put an end to by either party expressing such to be his will, but only at the end of the year; and they superadded to that what is expressed in the Year Book, 13 H. 8, fo. 13 b, viz., that it must be a half-year's notice. Thus we have the general rule of law that no notice was necessary; and then we have the exception established for the sake of convenience, that in the case of a tenancy from year to year, the notice to determine it shall be a six-months' notice. By parity of reasoning, I do not see how it is possible to infer that a tenant from week to week is entitled to any notice unless it be half a week's notice, as was suggested by Parke, B., in *Hinchliff* v. *Armistead*, 7 C. & P. 56. It is impossible to infer from the authority in the Year Book, that there must be a week's notice: nor do I find any authority, or any analogy in the law, to sustain that proposition. Opposed as my notion is to that of my Brother Williams, I do not doubt that I am wrong: but I cannot help thinking that the doctrine is a novelty and an unnecessary novelty, and therefore I object to its introduction." — *Per* WILLES, J., Ib. 797-800.

"Ever since the time of Henry VIII., a tenancy from year to year has been determinable only by a six-months' notice ending with the current year. It seems to me that the same convenience which dictated the notice there, makes it also necessary that a tenancy from week to week should be determinable only upon a reasonable notice. It may be that the law has not yet determined what that notice shall be. The state of the authorities seems to be this: There is *some* authority for saying that a week's notice is not necessary; but there is no authority declaring what notice is necessary. I would rather, therefore, decide the present case on the ground that no notice at all was given, whereas the law requires a reasonable notice, without taking upon myself to say what notice would be reasonable." — *Per* BYLES, J., Ib. 800.

CHAPTER VI.

INCORPOREAL HEREDITAMENTS.

SAUNDEYS *v.* OLIFF.

QUEEN'S BENCH. 1597.

[*Moore*, 467.]

TRESPASS. The defendant prescribes for common, and counts that one Verny, Knight, was seised in fee of the messuage and place where &c. and that he granted the messuage with all the commons appurtenant; and avers that all the tenants of the messuage have used to have common in the place where &c. And it is adjudged against him who so prescribed, because there appears to have been unity of possession of the messuage and of the Lower Cow Pasture, (being the place where &c.,) in Verney, in which case the common is extinct, and then cannot pass by words of common appurtenant and regarding the messuage. But "all commons usually occupied with the messuage" would have passed such common as the first was.[1]

BRADSHAW *v.* EYRE.

QUEEN'S BENCH. 1597.

[*Reported Cro. Eliz.* 570.]

TRESPASS *de clauso fracto* in Abney. The defendant pleads, that long time before, &c., one Nicholas Bagshaw was seised of the place where, &c., in fee; and that one Godfrey Fuljamb was seised in fee of an house, and twenty acres of land in Abney aforesaid; and that the said Godfrey Fuljamb, and all they whose estate, &c., have had for him, his farmers and tenants of the premises, common in the said place where, &c., for all their beasts, at all times of the year, as to the said tenement appertaining; and that the said Godfrey Fuljamb enfeoffed of the said tenement the said Nicholas Bagshaw; and that afterward the said Nicholas Bagshaw let unto the defendant the said house, and twenty acres of land, with "all commons, profits, and commodities thereto appertaining, *vel occupat. vel usitat. cum predicto messuagio*:" and

[1] See *Grymes* v. *Peacocke*, 1 Balst. 17; *Clements* v. *Lambert*, 1 Taunt. 205; *Whalley* v. *Tompson*, 1 B. & P. 371 (under a will); *Hall* v. *Byron*, 4 Ch. D. 667.

thereby justifies the putting in of his cattle to use the common, &c. It was thereupon demurred; and the matter in law was only, Whether this common, being extinct by the unity of possession, may be revived by any of those words? or, Whether it may not inure as a new grant of common for so many years? — And by GAWDY and FENNER (PORHAM and CLENCH *absentibus*) it was held clearly, that this common was extinguished by the unity of possession, it being common appurtenant, and cannot be revived again, although a feoffment had been made of the land. GAWDY said, that so it is of common appendant; and, as to this purpose, there is not any difference betwixt them. But they held, that by the words of the lease, "of all commons, profits, &c., occupied or used *cum messuagio*, &c.," it is a good grant of a new common for the time; for although it were not common in the hands of the feoffor, yet it is *quasi* common used therewith; and although it be not the *same* common it was before, yet it is the *like* common.[1] But because there was not a sufficient averment that this common was used by the lessee at the time of the lease, it passed not. And it was therefore adjudged for the plaintiff.

NICHOLAS *v.* CHAMBERLAIN.

KING'S BENCH. 1606.

[*Reported Cro. Jac.* 121.]

TRESPASS. It was held by all the court upon demurrer, That if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, *et quasi* appendant thereto: and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them.

But by POPHAM, Chief Justice, if the lessee erect such a conduit, and afterward the lessor, during the lease, sell the house to one, and the land wherein the conduit is to another, and after the lease determines: he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it; because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is, if a disseisor of an house and land erect such a conduit, and

[1] Held accordingly in *Wheeldon* v. *Kingswell*, Cro. El. 794.

the disseisee re-enter, not taking conusance of any such erection, nor using it, but presently after his re entry sells the house to one, and the land to another; he who hath the land, is not compellable to suffer the other to enjoy the conduit. — But in the principal case, by reason of the mispleading therein, there was not any judgment given.

CLARK *v.* COGGE.

King's Bench. 1607.

[*Reported Cro. Jac.* 170.]

Trespass. Upon demurrer the case was, The one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the plaintiff's land, there being no other convenient way adjoining: and, Whether this were a lawful claim? was the question.

And it was resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his land: *e contra converso*, if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it, as reserved unto him by the law; and there is not any extinguishment of a way by having both lands. Wherefore it was adjudged accordingly for the defendant.[1]

PACKER *v.* WELSTED.

Upper Bench. 1658.

[*Reported* 2 *Sid.* 39, 111.]

Special verdict. There are three parcels of land, and the necessary and private way is out of the first parcel to the second, and out of the first two parcels to the third parcel. J. S. purchases all these parcels, and then aliens the first two of these parcels to J. N., and the question was, if he shall have a way over the first two parcels to his third parcel. The jurors also found that the alienation was by feoffment, and that there was no other way to come to the land not aliened but by the other land.

Powes, for the plaintiff.

Windham, for the defendant.

[1] See *Howton* v. *Frearson*, 8 T. R. 50; 1 Wms. Saund. 323, note 6. The grantor has the right to select the way, provided it is convenient. *Bolton* v. *Bolton*, 11 Ch. D. 968.

GLYN C. J. If one has a highway on his land and makes a feoffment of the land, yet can he, as subject of the King, use the way. But our case is of the private way, which, as the case is, cannot be called a way properly, because it was to be taken on his own land. But the jurors having found it to be of necessity, it seems to me that the way remains, for it is not only a private inconvenience, but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied; and so has been the opinion of the Lord Rolles, as I hear on the circuit at Winchester.

And the defendant can take a convenient way without the leave of the plaintiff and the law can then adjudge if it is convenient and sufficient [*vel plus ou nemy*] and by all the court judgment was given for the defendant that the unity had not destroyed the way, but that the way continues.[1]

PALMER *v.* FLETCHER

KING'S BENCH. 1663.

[*Reported* 1 *Lev.* 122.]

CASE was brought for stopping of his lights. The case was, A man erected a house on his own lands, and after sells the house to one, and the lands adjoining to another, who by putting piles of timber on the land, obstructed the lights of the house: And 't was resolved, That although it be a new messuage, yet no person who claims the land by purchase under the builder, can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by TWYSDEN and WYNDHAM, Justices, HYDE being absent, and KELYNGE doubting. For the lights are a necessary and essential part of the house. And KELYNGE said, Suppose the land had been sold first, and the house after, the vendee of the land might stop the lights. TWYSDEN to the contrary said, Whether the land be sold first or afterward, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees: and cited a case to be so adjudged: but all agreed, that a stranger having lands adjoining to a messuage newly erected, may stop the lights: for the building of any man on his lands, cannot hinder his neighbor from doing what he will with his own lands: otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription. And afterwards in Mich. 16 Car. 2, B. R. a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.[2]

[1] *Arundel, Duchess of, v. Trafford*, 2 Lutw. 1487 (1701). See *Bolton v. Bolton*, 11 Ch. D. 968.

[2] S. c. *sub nom. Palmer v. Flethers*, 1 Sid. 167. See *Compton v. Richards*, 1 Price, 27; *Kelk v. Bennett*, 21 Ch. Div. 534; *Birmingham &c. Building Co. v. Ross*, 38 Ch. Div. 295.

SACHEVEREL *v.* FROGATE.

KING'S BENCH. 1671.

[*Reported* 1 *Vent.* 161.

IN covenant, the plaintiff declared, that Jacinth Sacheverel seised in fee, demised to the defendant certain land for years, reserving £120 rent. And therein was a covenant; that the defendant should yearly, and every year, during the said term, pay unto the lessor, his executors, administrators and assigns the said rent; and sets forth, how that the lessor devised the reversion to the plaintiff, and for £120 rent since his decease he brought the action.

The defendant demanded oyer of the indenture, wherein the reservation of the rent was yearly during the term to the lessor, his executors, administrators and assigns, and after a covenant *prout* the plaintiff declared, and to this the defendant demurred.

It was twice argued at the bar, and was now set down for the resolution of the court, which HALE delivered with the reasons.

He said they were all of opinion for the plaintiff. For what interest a man hath, he hath it in a double capacity, either as a chattel, and so transmissible to the executors and administrators, or as an inheritance, and so in capacity of transmitting it to his heir.

Then if tenant in fee makes a lease, and reserves the rent to him and his executors, the rent cannot go to them, for there is no testamentary estate. On the other side, if lessee for a 100 years should make a lease for 40 years, reserving rent to him and his heirs, that would be void to the heir.

Now a reservation is but a return of somewhat back in retribution of what passes; and therefore must be carried over to the party which should have succeeded in the estate if no lease had been made, and that has been always held, where the reservation is general.

So, though it doth not properly create a fee, yet 'tis a descendible estate: because it comes in lieu of what would have descended; therefore constructions of reservations have been ever according to the reason and equity of the thing.

If two joint-tenants make a lease, and reserve the rent to one of them, this is good to both, unless the lease be by indenture; because of the estoppel, which is not in our case, for the executors are strangers to the deed.

'Tis true, if A. and B. join in a lease of land, wherein A. hath nothing, reserving the rent to A. by indenture, this is good by estoppel to A. But in the *Earl of Clare's Case* it was resolved, that where he and his wife made a lease reserving a rent to himself, and his wife and his heirs, that he might bring debt for the rent; and declare as of a lease made by himself alone, and the reservation to himself; for being

in the case of a feme covert there could be no estoppel, although she signed and sealed the lease.

There was an indenture of demise from two joint-tenants reserving £20 rent to them both; one only sealed and delivered the deed, and he brought debt for the rent, and declared of a demise of the moiety, and a reservation of £10 rent to him. And resolved that he might. Between *Beard* and *Cartwright*, 2 Roll. Ab. 453, pl. 21. And in the Common Pleas, Pas. 40 Eliz., tenant in tail made a lease reserving a rent to him and his heirs, it was resolved a good lease to bind the entail, for the rent shall go to the heir in tail along with the reversion, though the reservation were to the heirs generally. For the law uses all industry imaginable, to conform the reservation to the estate. *Whitlock's Case*, 8 Co., is very full to this, where tenant for life, the remainder over so settled by limitation of uses, with power to the tenant for life to make leases, who made a lease reserving rent to him, his heirs and assigns.

Resolved, That he in the remainder might have the rent upon this reservation.

So put the case, that lessee for a 100 years should let for 50, reserving a rent to him and his heirs during the term; I conceive this would go to the executor. 'T is true, if the lessor reserved the rent to himself, 't is held, it will neither go to the heir or executor: but in 27 H. 8, 19, where the reservation is to him and his assigns, it is said, that it will go to the heir. And in the case at bar the words executors and administrators are void; then 't is as much as if reserved to him and his assigns during the term, which are express words declaring the intent, and must govern any implied construction, which is the true and particular reason in this case.

The old books that have been cited have not the words during the term. *Vid.* Lane, 256. *Richmond and Butcher's Case* indeed is judged contrary in point, 3 Cro. 217, but that went upon a mistaken ground, which was the manuscript report 12 E. 2. Whereas I suppose the book intended was, 12 E. 3, Fitz. Assize, 86, for I have appointed the manuscript of E. 2 (which is in Lincoln's Inn Library) to be searched, and there is no such case in that year of E. 2. The case in the 12 E. 3, is a man seised of two acres, let one, reserving rent to him, and let the other, reserving rent to him and his heirs; and resolved, that the first reservation should determine with his life, for the antithesis in the reservation makes a strong implication that he intended so. In *Watton and Ekeril's Case*, 5 Jac., the words of reservation were yielding and paying to the lessor, and his assigns. And resolved, that the rent determined upon his death. In that case there wanted the effectual and operative clause during the term.

The *Case of Sury and Brown* is the same with ours in the words of reservation; and the assignee of the reversion brought debt, and did not aver the life of the lessor. And the opinion of Jones, Croke and Doderidge was for the plaintiff; Latches Rep. 99.

The law will not suffer any construction to take away the energy of these words, during the term.

If a man reserves a rent to him or his heirs, 'tis void to the heir, 1 Inst. 214 a. But in *Mallory's Case*, 5 Co., where an abbot reserved a rent during the term to him or his successors, it was resolved good to the successor.

It is said in *Brudnel's Case*, 5 Co., that if a lease be made for years, if A. and B. so long live, if one of them dies, the lease determines, because not said, if either of them so long lives. So it is in point of grant. But it is not so in point of reservation, for Pas. 4 Jac. in the Common Pleas between *Hill and Hill*, the case was, a copyholder in fee (where the custom was for a widow's estate) made a lease by license, reserving rent to him and his wife during their lives (and did not say, or either of them), and to his heirs: it was resolved.

First, that the wife might have this rent, though not party to the lease.

Secondly, that though the rent were reserved during their lives, yet it should continue for the life of either of them; for the reversion, if possible, will attract the rent to it, as it were by a kind of magnetism.[1]

MORRIS *v.* EDGINGTON.

COMMON PLEAS. 1810.

[*Reported* 3 *Taunt.* 24.]

THIS was an action brought by a tenant against his lessor upon the covenant in a lease for quiet enjoyment, and charging the defendant with having obstructed a way thereby demised. The defendant, by his lease, demised all that part of all those messuages or tenements and premises called the Bear and Ragged Staff in the northeast corner of West Smithfield, situate on the west side of the gateway or entrance to the premises; and also so much of the said messuage as extends over the gateway, and the room or apartment adjoining to the gateway on the east side thereof, then lately used as a kitchen to the said messuage, but then converted into a tap-room, and the cellar below the same; together with full ingress, egress, and regress out of and into the yard of the lessor, lying beyond the said gateway, at all seasonable times of the day, with horses and carts, for depositing porter, wine, and liquors in the cellars, and taking away the casks [this was not the right of way which was charged to have been obstructed], and all other ways and easements to the said devised premises belonging and appertaining. Except and reserved to S. Toomer (the ground landlord), and to the defendant all other premises not thereby particularly demised, and also

[1] On the reservation of rent in a lease under a power, see *Greenaway* v. *Hart*, 14 C. B. 340; *Yellowly* v. *Gower*, 11 Ex. 274.

reserving the said gateway or entrance, and the yard, and the warehouse then lately erected over the same, occupied by Palthorpe, subject to the right of way and passage aforesaid, and all the buildings on the east and north sides thereof. The defendant pleaded, first, that he suffered to enjoy: secondly, that he did not obstruct. Upon the trial of this cause, at the sittings after Hilary Term, 1810, at Guildhall, before *Mansfield*, C. J., it appeared in evidence that the yard and warehouse reserved in the lease were used by common carriers, who unloaded their wagons and deposited valuable goods there: that the approach thereto was through the reserved gateway, and thence forward; and that the most obvious and usual approach to the tap-room from the public street was through the same gateway, upon entering which the door of the tap-room was seen on the eastern side of it, with a finger-board fixed up, which had been placed there while the lessor occupied the premises, pointing and directing "to the tap-room." That for the security of the carrier's goods deposited in the yard, the defendant caused the great gates of the gateway or entrance, which abut upon the public street, to be closed every night between six and seven o'clock, and refused after that time to open them for the admission of persons frequenting the tap-room. The plaintiff himself had formerly kept this public-house, and converted the kitchen to a tap-room, and while he kept it himself, and until, and at the time of making this demise, the access allowed for customers to the tap room was the obvious and public one of entering from the public street through the gateway mentioned in the lease, which at that time was not accustomed to be closed till ten or eleven at night. It was proved that on the western side of the gateway was a coffee-room, having a door in front, opening to the public street, for persons frequenting it to enter: and communicating with the residue of the demised messuage by a door on the back part of the coffee-room, the coffee-room communicated with one end of a passage which ran behind it, and the other end whereof communicated with the reserved gateway; being the passage through which dinners were conveyed from the tap room, while it was the kitchen, to the coffee-room, and through which liquors from the tap-room were still brought thither; so that when the great gates were closed, persons might enter the coffee-room from the street, go through it into this passage, and along this passage into the gateway, and crossing the gateway, would find themselves in the tap-room: but this approach to the tap-room being less public and obvious, invited fewer customers at night after the great gates were shut, and the plaintiff had in consequence experienced a loss in his trade. The defendant contended, that the exceptions in the lease precluded the plaintiff from using any right of way, except the right of way to the cellar through the gateway with liquors, which was expressly granted to him, and the right to enter the demised premises through the public door of the coffee-room, and from thence to go by a way of necessity from the western part of the messuage across the reserved gateway to the tap-room: for the plaintiff it was contended, that he was entitled

to have access to the tap-room from the street through the gateway at all times, and the jury found a verdict for the plaintiff.

Shepherd, Serjt., in Easter Term, moved for a rule *nisi* to set aside the verdict and have a new trial, upon the ground that it appeared by the evidence, that no such way was demised as the way which was proved to be obstructed. The court granted a rule *nisi*.

Lens and *Best*, Serjts., showed cause.

Shepherd, in support of his rule.

MANSFIELD, C. J. The case certainly has admitted of some curious argument, and very well bottomed in the case of *Clements* v. *Lambert*, 1 Taunt. 205, and no doubt a right of way, like a right of common, must be claimed as appurtenant; and if either hath been extinguished by unity of possession, it will no longer pass by the name of appurtenant: but there is a wide difference between a lease or a grant with easements over other foreign land, and a grant where the easements are in the lessor's land. All deeds are to be most strongly taken against the maker; and all deeds and writings are to be taken *secundum subjectam materiam*. Now what is the case here? There is no way that we hear of, at all, belonging to these premises, except the way over the land in question. Now, as we hear of no other ways, and as it is impossible that these parties, who are supposed necessarily to understand the law, could suppose these ways were ways appurtenant: they therefore meant them, being the only subsisting ways, by the improper name of ways appurtenant. I say nothing of what is a way of necessity; I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had. Then what are the circumstances of this case? First, it is much more convenient for any one to go to the tap room through the gateway than through the coffee-room. And it is much more convenient to carry out beer through the gateway than through the coffee-room. Can it then be doubted that the intent was to give the same use of the way, over the gateway, as the lessor before used to have? An argument has been built on the reservation of the gateway and yard, subject to the right of way with carriages and liquors to the cellar: but that is a particular sort of way, and has no connection or reference at all with this way contended for, or the use of the tap-room. It is said, if this was a necessary way it could not pass by this deed; that I do not at all understand: if there be any right of way at all, it must pass under this lease, under which the plaintiff holds the premises. The argument founded on the expression of the special right of way goes too far; for if it deprives the plaintiff of this way, it deprives him of all ways to the tap-room. This does not at all break in upon or affect the authority of *Clements* v. *Lambert*, and the other cases, on which it is held that easements are extinguished by unity of possession.

LAWRENCE, J. Your argument derived from the express grant of the right of way to the cellar does not stand on good foundation: if that

had not been granted especially, a general right of passage through the yard to and from the cellar for all purposes might have passed, not only to and from West Smithfield, but to and from other places; so that it was for the lessor's interest that a special grant was introduced as a restriction.

Rule discharged.[1]

BARLOW *v.* RHODES.

Exchequer. 1833.

[*Reported* 1 *Cr. & M.* 439.]

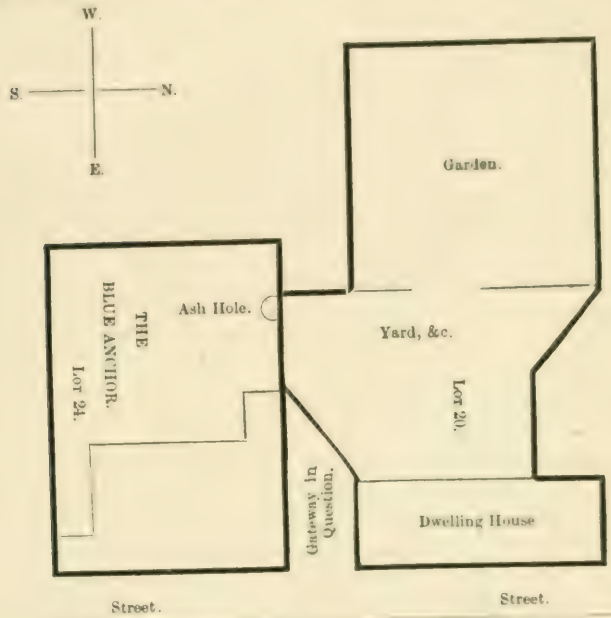
This was an action of trespass for breaking and entering the plaintiff's close, and pulling down his wall, at Wetherby, in Yorkshire. The defendants pleaded several special pleas, of which only the third and seventh were relied upon at the trial. The third plea justified the trespasses, under a claim of a right of way over the *locus in quo*, under a grant from the Duke of Devonshire, when owner in fee. The seventh plea claimed a right of way of necessity. The replications traversed these rights.

It appeared upon the trial before *Bolland*, B., at the last Summer Assizes for the County of York, that the Duke of Devonshire, being the owner in fee of the town of Wetherby, put it up to sale by auction, in lots, in October, 1824. At that sale, a Mrs. Dawson, under whom the defendants claimed, became the purchaser of the Blue Anchor public-house and back premises, being lot twenty-four; and the plaintiff became the purchaser of lot twenty, consisting of a dwelling-house

[1] See *Pinnel* v. *James*, 5 B. & Ad. 791; 4 A. & E. 749 (a case of partition).

"It is however insisted that the meaning of the word '*appurtenances*' may be extended, either by reference to the actual state of the subject of the grant, or to the context, and the case of *Morris* v. *Edgington*, 3 Taunt. 24, is referred to in support of the former position. That was, as is observed by Mr. Baron Bayley (1 Cromp. & Mees. 449), not a case properly requiring the construction of the words 'belonging' and 'appertaining,' because, if there had been no such words, the Law would have implied the way in question as a way of necessity, and all that the court determined was, that one way being necessary, and there being two, the more convenient way to the house passed. Some expressions are attributed to Lord Chief Justice Mansfield in the report, which can hardly be correct. He is stated to have said, that 'as we hear of no other ways, and as it is impossible that those parties, who are supposed necessarily to understand the law, could suppose there were "*ways appurtenant*," they therefore meant them, being the only subsisting ways, by the improper name of "ways appurtenant."' It would have been more correct to have stated, that one of the ways would have passed as a way of necessity, and not to have made use of the absence of other ways as a ground for extending the meaning of the term 'appurtenant;' and indeed it would be dangerous to press the general words of a conveyance into a proof that the parties may have meant something to pass under such, for such words are generally inserted to cover any right which may possibly exist, and there are scarcely any conveyances in which all such words are omitted." — *Per* Lord Denman, C. J., in *Pinnel* v. *James*, 5 B. & Ad. 791, 794.

fronting the street, with a yard, back premises, and garden behind. In lithographed plans exhibited at the sale, the gateway between the two properties towards the street, and over which the right of way in question was claimed, was excluded from both lots by strong black lines, as in the subjoined plan : —



The Duke conveyed the Blue Anchor to Mrs. Dawson in fee, by indentures of lease and release, dated the 12th and 13th April, 1825, together with "all ways, roads, rights of road, paths, passages, &c., to the said hereby conveyed premises, or any part thereof, *belonging, or in any wise appertaining*." This conveyance was registered the 28th June, 1825. By indentures of lease and release of the 25th and 26th May, 1825, the Duke conveyed to the plaintiff in fee, the messuage, yard, garden, &c., forming lot twenty, and also the gateway in question, by the description of "the road and gateway, and the ground and soil thereof, at the south end of the messuage, excluding all other persons from every right whatsoever in, to, or over the same road, gateway, and ground, and every part thereof." This conveyance was registered the 16th January, 1826. It further appeared at the trial, that Mrs. Dawson, at the time of the sale and conveyance, was tenant to the Duke of the whole of lot twenty-four; that a part of that lot, at the north-east corner of the Blue Anchor, next to the gateway (which at that time was used by Mrs. Dawson as a kitchen to the Blue Anchor, Mrs. Dawson having made an internal communication between them when she became occupier of the whole), had been formerly occupied

by an under-tenant as a cottage and distinct tenement; and that such separate occupation was put an end to in 1818 or 1819, under a general order from the Duke against under-tenancies. The gable end of the Blue Anchor had no door or window into the gateway, but the cottage or kitchen had a door into the gateway, and the tenants used the road from that door down the gateway into the street, particularly while that part of the property was occupied as a separate tenement, the gateway being then the only way to it. There was also an ash-hole behind the cottage or kitchen; and the tenants of the Blue Anchor, and of the cottage, while it was a distinct tenement, used the gateway as a road to the ash-hole for the purpose of depositing their ashes, but nothing separated the ash-hole from the rest of the yard behind the Blue Anchor. The plaintiff's counsel objected to the plans being received in evidence to explain the conveyances; but the learned judge admitted them, subject to the objection. He was of opinion that the defendants had failed in proving a right of way by an implied grant, or of necessity; and the jury, under his direction, found a verdict for the plaintiff.

Pollock, in the course of Michaelmas Term, obtained a rule for a new trial, against which —

Coltman and *Tomlinson*, now showed cause.

Pollock and *Hoggins*, contra.

LORD LYNDHURST, C. B. The question in this case turns on the meaning of the words "appertaining" and "belonging." The messuage is conveyed, "together with all ways, roads, rights of road, paths and passages to the said hereby demised premises, or any part thereof, belonging or in anywise appertaining." The word "belonging," and the word "appertaining," I consider to be, as here used, synonymous; and it is quite clear, that the way which is claimed is not appurtenant to the messuage, in the ordinary legal sense of the word "appurtenant." From the case of *Morris* v. *Edgington* [3 Taunt. 24], it should appear that the word may receive a more extensive construction where you collect from the deed itself that such was the meaning of the parties: and, looking merely at the deed itself in that case, it was quite clear that the parties there did not intend to use the word in its strict legal sense. There is nothing, however, in the conveyance in the present case, from which I can collect that the parties have intended to use the words in other than their usual legal meaning. It has been urged upon us, that we may look at the plan which accompanied the particulars of sale. Now, without deciding whether or no we can look at the plan for the purpose of enabling us to give a different construction to these words, it is sufficient for me to say, that, looking at the deed and plan together, I am not satisfied that the words were intended to be used in any other than their ordinary legal sense. As I am not satisfied that the parties used these words in any other sense, I conceive myself bound to give them their ordinary legal meaning: and I am, therefore, of opinion, that the defendant did not make out his justification, and, consequently, that this rule should be discharged.

BAYLEY, B. I am of the same opinion. It has been decided over and over again, that where an easement has become extinct by unity of ownership, and the owner wishes to grant the easement with the premises, to which it was formerly appurtenant, he must use language to show that he intended to create the easement *de novo*. If you convey the close, with all ways thereto belonging and appertaining, the easement will not pass, except in a case of a way of necessity, where such right of way would pass without any words of grant of ways. That was decided in *Grymes* v. *Peacock*, 1 Bulst. 17, where the right of common was extinguished by unity of ownership. If, in the case of an easement extinguished by unity of ownership, a man grants the land, to which, before the extinguishment, the right of common was attached, and uses only the words "appertaining" and "belonging," the right will not pass, these words not being sufficient to revive the right. There are, however, apt words for the purpose of passing such an easement; and, if you will only insert the words "or therewith used and enjoyed," the right would pass. It has been said at the bar, that there is a distinction between "belonging" and "appertaining;" it is the first time I have ever heard of such a distinction; and in all the cases referred to, where these words have occurred, the courts have uniformly considered them as having the same meaning. It has been said also, that we are at liberty, in this case, to refer to the plan on the particulars of sale, for the purpose of aiding us in our construction of this deed. I will not speak with certainty on this point; but, my present impression is, that we cannot look *dehors* the deed. If I were at liberty to refer to the plan, I should be of opinion, that no intention appears to use the words in a different sense from their ordinary legal one. [The learned Baron then described the premises from the plan.] I should consider this as a plan describing the premises in their then state; but, it appears to me, that it would be a most forced construction to say, that it was intended to continue a right of way through the opening. If the party means to grant a way, which is not essential to the enjoyment of the premises demised, he must use the proper and apt words for such purpose. In this case such a way was not essential to the enjoyment of the premises demised. [The learned Baron then stated other reasons for not thinking that the intention of the parties was as contended for on behalf of the defendant.] We have been pressed with the case of *Morris* v. *Edgington*. I consider that merely as a case of a way of necessity, and not as a case properly requiring the construction of the words "belonging" and "appertaining;" because, if there had been no such words, the law would have implied the way in question, on the principle, that where you grant property, you grant the right of access to that property. There were two ways of getting into the yard in question in that case. One or other was essential to the use of the tap-room as a way of necessity. There being only two ways, and one way being necessary, all that the Court of Common Pleas had to decide was, to which of the two was the plaintiff entitled. Now, one

was a more natural and convenient way than the other, and that was therefore determined to be the one which the plaintiff was entitled to use. That case not appearing to me to apply to the present, and a current of authorities settling the legal construction of the words in question, I am of opinion that we are bound to construe these words according to their ordinary legal sense; and, therefore, that this rule should be discharged.

Bolland, B. I remain of the same opinion as at the time of the trial. It appears to me, that we are to look to the words of the conveyance only, and to say, whether we can give them a different interpretation from that which they ordinarily bear in legal instruments. In *Morris* v. *Edgington*, a larger interpretation than usual was given to these words; but that was because it was clearly the intention of the parties. In this case I look at the conveyance and find merely the words usual in all conveyances. We have been pressed to go out of the deed. Even if it were conceded to the defendant, that he has a right to avail himself of the plan, which right I very much doubt, I think that he would derive no benefit from it. [The learned Baron then stated his reasons for thinking that the plan and deed taken together did not warrant the inference, that the right of way in question was intended to pass.]

Gurney, B. I do not see anything in this case to show, that the parties intended to use these words in a different sense from the ordinary legal one.

Rule discharged.[1]

WICKHAM *v.* HAWKER.

Exchequer. 1840.

[*Reported* 7 *M. & W.* 63.]

Parke, B.[2] This case was tried before my Brother *Coleridge*, at the last Summer Assizes at Winchester, when several points were reserved, which were fully argued before my Brothers *Alderson*, *Gurney*, and myself, at the sittings after Hilary Term.

It was an action of trespass *qu. cl. fr.* against the defendant Hawker and two others, for entering the plaintiff's closes, and hunting and searching for and killing game.

The special pleas were, first, that Vidler and Cox were seised of the manor of Bullington, in trust for Widmore, and that Widmore, Vidler, and Cox, by an indenture, in 1712, between them and Wade, and sealed by Wade, released parcel of the demesne lands of the manor of Bullington, comprising the *locus in quo*, to Wade, "excepting and always reserving to Widmore, Vidler, and Cox, their heirs and assigns, liberty, with servants or otherwise, to come upon the lands so con-

[1] But see *Thomas* v. *Owen*, 20 *Q. B. Div.* 225.

[2] The statement of facts is omitted, and part only of the opinion given.

veyed, and there to hawk, hunt, fish, and fowl at any time thereafter, at their will and pleasure: and the said John Wade did thereby grant to Widmore, Vidler, and Cox, their heirs and assigns, the said liberty so excepted and reserved." The plea then states a release and conveyance from Vidler and Cox to Widmore of the manor and liberty, and deduces from him a title to both to the defendant Hawker, and he and the others, as his servants and in his company, justify the trespasses by virtue of the liberty.

The second special plea states, that the occupiers of the manor had used and enjoyed, and Hawker as such occupier was entitled to use and enjoy, the right of hunting, hawking, and fowling, for sixty years, by themselves and with servants.

The replication to the first plea takes issue on the allegation of a grant. That to the second denies the user and enjoyment. There was a new assignment of the trespasses committed by the two other defendants, by command of Hawker in his absence, in hunting, &c.; and pleas to the new assignment, — first, a reservation and grant of a liberty, in the like terms and by a similar deed to that in the second plea, to hunt, &c. *by* servants; secondly, a similar plea to the third, of sixty years' user, by the occupier and *by* servants.

The replication to the first plea to the new assignment denied the grant; to the second, denied the user and enjoyment.

The principal questions in the case were, how the issues raised by the replication to the first special plea to the declaration, and the first plea to the new assignment, ought to be found; and that depends upon the legal effect of the deed of 1712.

The liberty "of hawking, hunting, fishing, and fowling," is, by the terms of that deed, "excepted and reserved to Widmore, Vidler, and Cox;" but so far as related to Widmore it could not be a good exception or reservation, because he was not a conveying party to the deed: nor is such a liberty, whether it be a mere easement or a profit *à prendre*, properly and in correct legal language, either an exception or a reservation. This point was expressly decided in the case of *Doe d. Douglas* v. *Lock*, 2 Ad. & Ell. 743, where most of the authorities were cited and fully considered. Lord Denman, in delivering the judgment of the court, says, "that the privilege of hawking, hunting, fishing, and fowling is not either a reservation or an exception in point of law; it is only a *privilege* or *right granted* to the lessor, though words of reservation and exception are used." As the indenture was executed by Wade, the words of reservation and exception operated as a grant by him to the three — Widmore, Vidler, and Cox, and the plea properly stated the legal effect of those words as a grant by him. Consequently this issue ought to have been found for the defendant, and the verdict must be entered accordingly.

The next question is, how the verdict is to be entered on the replication to the first plea to the new assignment, and that depends upon the legal effect and operation of the words of a grant to persons, their *heirs*

and assigns, "of free liberty, *with servants or otherwise*, to come into and upon the lands, and there to hawk, hunt, fish, and fowl." If these words authorize the grantee to send his servants to hawk, hunt, fish, and fowl for him, in his absence, the issue ought to be found for the defendant; otherwise not.

We are of opinion that this issue must be found for the defendant. The authorities upon this subject take this distinction: that if there be *a personal license of pleasure*, it extends only to the individual, and it cannot be exercised with or by servants; but if there is *a license of profit*, and not for pleasure, it may. This will be found so laid down in the case of *The Duchess of Norfolk* v. *Wiseman*, Year Book, 12 Hen. 7, 25, and 13 Hen. 7, 13, pl. 2, which appears to be the leading case on this subject.

The *Duchess of Norfolk's Case* was this: — The Duchess brought an action for chasing in her park, against Wiseman and others. They pleaded that the Duchess licensed the Earl of Suffolk to hunt at his pleasure in the park, and they showed, at the time of the trespass, the earl came into the park, and the defendants with him, to hunt: and it was moved that the plea was bad, for by the license given to the earl, which was only for pleasure and extended only to him, and no other could justify by that license; for if I give license to a man to eat with me, none of his servants can justify the entry into my house by reason of that license, for it is a license of pleasure; and so if I give leave to another to go at his pleasure into my orchard, none of his servants can justify by that license: but if it is a license of profit, and not of pleasure, it is otherwise; for if one give leave to me to carry over his land with my cart, my servants can justify by his license; and so if one gives me license to have a tree in his wood, my servants may justify the cutting of the wood, and the entry, for I shall have profit by that; and so was the opinion of the court: and then the defendants said the Duchess gave license to the earl to hunt, kill, and *take with him* the deer at his pleasure, and then they said that the earl came there and they with him, and by his command, hunted and took away: and that was held good.

This case is cited, with others, in Manwood, *c.* 18, § 3, p. 107, and the result is, that, if there be a personal license to an individual to hunt at his pleasure, he cannot take away to his own use the game killed, or go with servants, still less send servants to kill for him, or assign his license to another: but if the person is meant to have a property in the game which he kills, it is otherwise; and therefore if the license is to hunt, kill, and carry away, he may hunt with servants or by servants. And *e converso*, if there be a license for him *and* his servants to hunt, "by these words, for him and his servants, shall be understood a license of profit; for these words imply that the grantee hath a property in the thing hunted, because that by such a license the grantee may justify for his servant to hunt, which is more than a license of pleasure." Manwood, 108.

This being the rule of law on the subject, the point to be decided here is, whether the liberty granted is a mere personal license of pleasure, or a grant of a license of profit, — a profit *à prendre*.

The liberty of *fowling* has been decided, in one case, to be a profit *à prendre*, and may be prescribed for as such. *Davies's Case*, 3 Mod. 246. The liberty to hawk is one species of *aucupium* (Manw. *c.* 18, § 10, p. 117), the taking of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature: it implies that the person who takes the fish, takes for his own benefit: it is common of fishing. The liberty of hunting is open to more question, as that does not of itself import the right to the animal when taken; and if it were a license given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal license of pleasure, to be exercised by the individual licensee. But this is a grant by deed, to persons, "their heirs *and assigns*;" it is clearly intended that not merely the particular individual named, but any to whom they or their heirs choose to assign it, should exercise the right; which seems to us to show that it is an interest, or profit *à prendre*, which is intended to be granted. Whether the liberty is to be exercised by the licensee or his *servants*, or by the licensee or his *assigns*, makes no difference in this respect; both show that not a personal license, but a license of profit, was intended to be granted. The case in the Year Book, 11 Hen. 7, fol. 86, bears materially on this view of the case. It is there said, "If one license me *and my heirs* to come and hunt in his park, I must have a writing (that is, a deed) of that license, for *a thing passes by the license*, which endures in perpetuity: but if he license me, one time to hunt, this is good without deed, for no inheritance passes."

It appears to us, that the liberties to hawk, hunt, fish, and fowl, granted to one, his heirs and assigns, are interests, or profits *à prendre*, and may be exercised by servants in the absence of the master; and further, we think that the addition "with servants or otherwise" does not *limit* the privilege, and exclude the exercise of it *by* servants. "Words tending to enlarge are not (unless the intention is very plain) to be taken to restrain." *Earl of Cardigan* v. *Armitage*, 2 B. & C. 209.

We therefore think that this issue must be found for the defendant.

Rawlinson (with whom was *Butt*) showed cause.

Erle and *Smirke*, contra.[1]

[1] "The rent, heriots, suit of mill, and suit of court, are the only things which, according to the legal sense and meaning of the word, are *reservations*. For we are of opinion, that what relates to the privilege of hawking, hunting, fishing, and fowling, is not either a reservation or an exception in point of law; and it is only a privilege or right granted to the lessor, though words of *reservation and exception* are used. And we think, that what relates to the wood and the underground produce is not a *reservation*, but an *exception*. Lord Coke, in his Commentary on Littleton, 47 a, says, 'Note a diversity between an exception (which is ever of part of the thing granted, and of a thing *in esse*), for which, *except*, *scilicet*, *prater*, and the like, be apt words; and a reservation which is always of a thing not *in esse*, but newly created or reserved out of the

PINNINGTON *v.* GALLAND.

EXCHEQUER, 1853.

[*Reported* 9 *Ex.* 1.]

MARTIN, B.[1] This is a special case, which was argued before us during the last term; and the question is, whether the plaintiff, as occupier of two closes called the Rye Holme closes, is entitled to a right of way over certain lands of the defendant.

The material circumstances are these: In the year 1839 a property consisting of five closes belonged to a Mr. Dickinson. Two of them were the Rye Holme closes, and they were separated by two of the others from the only available highway, the Town-street of Sutton-upon-Trent. From the year 1823 the road over which the plaintiff now claims the right of way was that which was used by Mr. Dickin-

lord or tenement demised.' In Sheppard's Touchstone, p. 80, 'A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before:' and, afterwards, 'This doth differ from an exception, which is ever of part of the thing granted, and of a thing in esse at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before; so that this doth always reserve that which was not before, or abridge the estate of that which was before.' And afterwards, 'It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing.' And afterwards, 'If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land or of a common, or other profit to be taken out of the land, these reservations are void.' In Brooke's Abridgment, title Reservation, pl. 46, it is said, that if a man leases land, reserving common out of it, or the herbage, grass, or profits of the land demised, this is a void reservation, for it is parcel of the thing granted, and is not like where a man leases his manor and the like, except White Acre, for there the acre is not leased; but here the land is leased; therefore the reservation of the herbage, vesture, or the like, is void. It must be observed, however, that, though in Co. Lit. 47 a, the distinction between a reservation and an exception is pointed out, yet in p. 143 a, speaking of the word *reservation*, Lord Coke says, 'Sometime it hath the force of *saving* or *exception*. So as sometime it serveth to reserve a new thing, viz., a rent, and sometime to except part of the thing *in esse* that is granted.' He does not, however, go on to illustrate that position; and as, only two pages before, in 141 a, he had used to the same effect as he had done in the former reference in 47 a, that 'a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant,' we cannot take this language of Lord Coke in 143 a, as identifying an exception and a reservation.

'There are, however, some cases reported, where, in the language of the court, the word 'reserve' is treated as meaning 'except,' as in Dyer, 12 a, Pl. 110. That, however, is only general language; and it does not make them the same in point of law. In the very last case of *Finney v. Scott*, 2 Man. & Ry. 235, the defendant pleaded that the plaintiff was tenant to the defendant of the close in which, &c., subject to a reservation to defendant of all pits in the close, with liberty to carry away the produce

[1] Only the opinion is here given.

son's tenant for the occupation of the Rye Holme closes. From a plan, which forms part of the case, the road appears to be the shortest and most direct access from the highway to the closes; and it having been used for so many years by the tenant who occupied the entire property, we think we may safely conclude that it was, and is, the most convenient road.

In 1839 the property was sold by Mr. Dickinson in three lots. A Mr. Moss purchased the Rye Holme closes, a Mr. Newbould purchased one of the other closes, and a Mr. Dearle purchased the remainder of the property, which includes that now belonging to the defendant, and over which the way in question goes. The deeds of conveyance to the three purchasers, although bearing different dates, were all executed on the same day, the 8th of April, 1840, and it cannot now be ascertained in what order of priority they were executed. No special grant or reservation of any particular way is contained in any of them; but in the conveyance to Mr. Moss, whose tenant the plaintiff is, there is

of the pits; and Mr. Justice Bayley said it was not *a reservation*, but *an exception*, and held the plea bad; and the counsel for the defendant did not further press the argument.

"It may be said, however, that, if the person who creates the power uses the word 'reserving' in such a way as to make an exception a reservation, it must be so taken; but we think not necessarily. Powers in many respects are construed so very strictly, that they must be so throughout.

"But, besides, it is not necessarily to be taken that what relates to the wood and underground produce is a reservation; there are other legal reservations, besides *rent*, to satisfy the words '*rent and reservations*;' and when the testator, in the lease of 1756, mentions wood and underground produce, he says *except and always reserved out of this present demise* and grant, all, &c.; and therefore if, in point of law, the matters are the subject of exception, they must be applied to the legal term used. And in *The Earl of Cardigan* v. *Armitage*, 2 B. & C. 197, where Sir Thomas Danby enfeoffed the Earl of Sussex of certain closes, *except and always reserved* out of the said feoffment to the said Sir Thomas all the coals in all or any of the said lands, together with free liberty to sink and dig pits, &c., Mr. Justice Bayley, in delivering the judgment of the court upon the pleadings, says, this constituted an exception; and he states the distinction between an *exception* and a *reservation*, and then he goes on to point out the effect of an exception upon the statement in the pleadings.

"Upon all these authorities, we are of opinion that what is said as to the wood and underground produce is not a *reservation*, but an *exception*." — *Per* Lord Denman, C. J., in *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705, 743–746. (1835.)

"It is to be observed that a right of way cannot, in strictness, be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing, which has been lately much considered in the cases of *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705, and *Wickham* v. *Hawker*, 7 M. & W. 63. It is not indeed stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of a grant from the lessee; but we presume that in fact the deed was, according to the ordinary practice, executed by both parties, lessee as well as lessors." — *Per* Tindal, C. J., in *Duckham*, &c. *R. Co.* v. *Walker*, 2 Q. B. 940, 967. (1842.)

comprised the usual words, "together with (*inter alia*) all ways, roads, paths, passages, rights, easements, advantages, and appurtenances whatsoever to the said closes belonging, or in any way appertaining." Mr. Dearle executed the deed of conveyance to him.

For several years after the execution of the conveyances, the occupier of the Rye Holme closes continued to use the road in question; but in 1843 the defendant, who had purchased from Mr. Dearle part of the land conveyed thus by Mr. Dickinson, and over which the way in question goes, disputed the plaintiff's right to use it. Attempts were made for arrangement, which failed, and we are now required to decide the point; and we are of opinion that the plaintiff, as occupier of the Rye Holme closes, is entitled to the right of way claimed.

It is impossible to ascertain the priority of the execution of the two conveyances (that to the third purchaser may be put out of consideration), and the plaintiff, having to establish his right, is bound to show that, whichever was the first executed, he nevertheless is entitled to the right of way.

First, assume that the conveyance to Mr. Moss was executed before that to Mr. Dearle. In this case there would clearly be the right of way. It is the very case put by Mr. Serjt. Williams in his note to *Pomfret* v. *Ricroft*, 1 Wms. Saund. 323, viz., "where a man having a close surrounded with his land, grants the close to another in fee, for life, or for years, the grantee shall have a way over the grantor's land, as incident to the grant, for without it he cannot have any benefit from the grant," and the way would be the most direct and convenient, which we think we may properly assume the one in question in the present case to be. This is founded upon the legal maxim, "*Quando aliquis aliquid concedit, concedere videtur et id sine quo res concessa uti non potest*," which, though it be clearly bad Latin, is, we think, good law.

Secondly, assume that the conveyance to Mr. Dearle was executed the first. In this case the Rye Holme closes were for a short period of time the property of Mr. Dickinson, after the property in the land conveyed to Mr. Dearle had passed out of him. There is no doubt, apparently, a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority, the law is the same, for the note proceeds thus: "So it is when he grants the land and reserves the close to himself;" and he cites several authorities which fully bear him out: *Clark* v. *Cogge*, Cro. Jac. 170; *Staple* v. *Heydon*, 6 Mod. 1; *Chichester* v. *Lethbridge*, Willes, 72, note. It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton* v. *Taylor*, 2 Lutw. 1487, that it was for the public good, as otherwise the close surrounded would not be capable of cultivation.

According to this law, therefore, the right of way would accrue to Mr. Dickinson upon the execution of the conveyance to Mr. Dearle,

and it would clearly pass to Mr. Moss under his conveyance, for it would be a way appurtenant to the Rye Holme closes, and would pass under the words "*all ways to the closes belonging or appertaining*," and, indeed, probably without them. The plaintiff has vested in him, as Mr. Moss's tenant, all his rights of way; and, for the above reason, we think that he is entitled to the judgment of the court.

There is a statement in the case respecting another road described in the plan as from C to D, which the defendant contends was the plaintiff's proper way. But it is perfectly clear, that, whatever may be the rights of the occupiers or owners of the two closes further to the east, called Maples and Catliffe closes, and which were sold and conveyed by Mr. Dickinson before the sales to Mr. Moss and Mr. Dearle, Mr. Moss or the plaintiff his tenant, upon the statement in the present case, has no right to the use of it; and, except by one or other of the roads, the case states that the plaintiff could not get to the Rye Holme closes without being a trespasser upon land other than Mr. Dickinson's.

Judgment for the plaintiff.

Hayes, argued for the plaintiff.
Hugh Hill, for the defendant.[1]

RICHARDS *v.* ROSE.

EXCHEQUER. 1853.

[*Reported* 9 *Ex.* 218.]

THE first count of the declaration stated, that the plaintiff was the owner of a certain messuage and dwelling-house, and was entitled to have the same supported by certain land and premises of the defendant adjoining thereto; yet that the defendant wrongfully and unlawfully dug, excavated, and made a drain-hole and tunnel, and removed and took away part of the said land of the defendant, and thereby deprived the said messuage and dwelling-house of the plaintiff of the said support to which she was lawfully entitled, whereby the walls, and parts of the said house cracked, gave way, and were damaged.

The second count charged the defendant with having negligently, &c., dug the drain, whereby the walls of the said dwelling-house were undermined, cracked, and damaged.

The defendant pleaded, first, Not guilty to the whole declaration;

[1] See *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761 (case under a will); *Lawes* v. *Scar*, L. R. 7 Eq. 427. That a way of necessity cannot arise by escheat, see *Proctor* v. *Hodgson*, 10 Ex. 824. On the creation of a way of necessity when land is taken on execution, see *Putnam* v. *Wood*, 2 Mass. 203; *Taylor* v. *Townsend*, 8 Mass. 411; *Russell* v. *Jackson*, 2 Pick. 574; and cf. *Kieffer* v. *Imhoff*, 26 Pa. 438. A grantee is not debarred from having a way of necessity because his deed has a covenant for warranty. *Brigham* v. *Smith*, 4 Gray, 297.

and secondly, to the first count, that the plaintiff was not entitled to have her said messuage or dwelling-house supported by the said land and premises of the defendant adjoining thereto. Upon which pleas issues were joined.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after last term, it appeared that the plaintiff's and defendant's houses adjoined each other, being numbers five and six in the same street; and that the action was brought to recover compensation for damage done to the plaintiff's house by the disturbance of its foundations. The houses had been originally the property of the same person; and in August, 1847, he demised them both to one Watmough, by separate instruments, for ninety-nine years. Watmough mortgaged them to one Brown, and he assigned his interest in the mortgage to one Halliday, who, under a power contained in the deed of mortgage, sold one of the houses to the plaintiff in July, 1849, and the other house to the defendant in the following month of September. At the time the houses were built, there was no public sewer, but the ground landlord, under the supervision of the Commissioners of Sewers, made a sewer through the public street for the convenience of the tenants; and the defendant, by the consent of the Commissioners, formed a drain in connection with the public sewer through his own house. In making this drain, the damage was occasioned for which the present action was brought.

On the part of the defendant, it was objected that, under this state of circumstances, the action could not be maintained, inasmuch as the plaintiff had not established her right to the support she claimed. The Lord Chief Baron left the case to the jury, who found a verdict for the plaintiff with £25 damages, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him.

Lush moved accordingly.

The court then intimated that the learned counsel might take a rule *nisi* upon the latter point, on payment of costs; but this he declined to do.

Cur. adv. vult.

Pollock, C. B., now said — In this case Mr. Lush moved for a rule *nisi* to set aside the verdict found for the plaintiff with £25 damages, and to enter a verdict for the defendant. We are all of opinion that there ought to be no rule. It seems to be clear that, where a number of houses are built upon a plot of ground, all the houses belonging to the same person, being all built together, and each obviously requiring the mutual support of its neighbors for their common protection and security, such right of mutual support equally exists, whether the owner parts first with one house, and then with another, or with two together, the ownership of the latter being afterwards divided, either by sale, mortgage, devise, or by any other means. The right does not depend upon the determination of the fact whether the houses are parted with at one or at separate times. That fact cannot affect the result where the houses are originally built, depending upon each other, and requir-

ing their mutual support. It seems to be purely a matter of common-sense, that the possessors are not to be deprived of that mutual support, and that a person in possession of one of the houses shall not be permitted to say to his neighbors, "You are not entitled to the protection of my house: I will pull it down to the ground, and will let the houses upon each side of it collapse and fall into the ruins." The case of *Pinnington* v. *Galland*, 9 Ex. 1, which is a recent decision of this court, seems to involve the same principle. That, however, was in respect of a right of way, and not of a right of support. But we are all of opinion that, where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of the houses, as against himself grants such right, and on his own part also reserves the right; and consequently the same mutual dependence of one house upon its neighbors still remains. Upon the point reserved, therefore, there will be no rule. The learned counsel seems also to have objected, that the finding of the jury must have been based upon something in the nature of a compromise, inasmuch as the damages, if any, should have been much greater in amount, and consequently that the verdict requires revision. It appears, however, to us that although there are cases in which such an argument might prevail, the present case does not fall within such principle. In the case of an action on a bill of exchange, to which the defendant pleads only that the bill is forged, and the jury find a verdict for the plaintiff, with damages one farthing, thereby compromising the matter by finding that the bill is not forged, and yet giving the plaintiff nominal damages only, the court would clearly see that the verdict is inconsistent, and that the jury had failed to discharge their duty. That principle does not apply where the damages are large. And, moreover, in this case there was evidence to show that the foundation of the plaintiff's house was not very secure, and consequently there was some color for the view which the jury took of the amount of damage occasioned by the defendant's act. The court are of opinion that the defendant is not entitled to a rule for a new trial upon this point, except upon payment of costs; and the learned counsel has declined to accept the rule upon that condition.

Rule refused.[1]

[1] See *Pearson* v. *Spencer*, 3 B. & S. 761 (case under a will); *Morrison* v. *King*, 62 Ill. 30 (also under a will); *Rogers* v. *Sinsheimer*, 50 N. Y. 646; *Adams* v. *Marshall*, 138 Mass. 228.

PYER *v.* CARTER.

EXCHEQUER. 1857.

[*Reported* 1 *H. & N.* 916.]

THE declaration stated, that before and at the time of committing the grievances, &c., the plaintiff was lawfully possessed of a messuage and premises with the appurtenances, situate in St. Anne Street, Liverpool, and by reason thereof was entitled to a drain or sewer, and passage for water, leading from the said messuage and premises, in, through, and under certain adjoining land at Liverpool aforesaid, through which the rain and water from the plaintiff's said messuage and premises of right had flowed, and still of right ought to flow, away from the plaintiff's said messuage and premises: yet the defendant wrongfully stopped up the said drain and sewer, whereby divers large quantities of rain and water which of right ought to have flowed, and otherwise would have flowed, through the same drain, sewer and passage for water, were prevented from flowing from the plaintiff's said messuage and premises, and flooded, soaked into and injured the same, &c.

Pleas. — First: Not guilty. Secondly: that the plaintiff was not entitled to the said drain, sewer, and passage for water; nor did the rain and water from the plaintiff's said messuage and premises of right flow, nor ought to flow, away from the plaintiff's said messuage and premises through the said drain, sewer and passage for water as alleged. — Issues thereon.

At the trial, before *Bramwell*, B., at the last Lancashire Summer Assizes, it appeared that the plaintiff and defendant were owners of adjoining houses situate in St. Anne Street, Liverpool. These houses had been formerly one house, and had belonged to a person of the name of Williams, who converted them into two houses. In July, 1853, Williams conveyed the defendant's house to him in fee. This conveyance contained no reservation of any easement. In September, 1853, Williams conveyed the plaintiff's house to him in fee. At the time of these conveyances a drain or sewer ran under the plaintiff's house and thence under the defendant's house and discharged itself into the common sewer in St. Anne Street. Water from the eaves of the defendant's house fell on the plaintiff's house, and from thence flowed down a spout into the drain on the plaintiff's premises, and so into the common sewer. The defendant blocked up the drain where it entered his house, and in consequence, whenever it rained, the plaintiff's house was flooded. The defendant stated that he was not aware of the drain at the time of the conveyance to him. It was proved that the plaintiff might construct a drain directly from his own house into the common sewer at a cost of about six pounds.

It was submitted on the part of the defendant, that the plaintiff had no right to the use of the drain under the defendant's house. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Hugh Hill, in the following term, obtained a rule *nisi* accordingly.

Edward James (with whom was *Raffles*) showed cause.

Hugh Hill and *Mellish*, contra.

Cur. adv. vult.

The judgment of the court was now delivered by

Watson, B. This was an action for stopping a drain that ran under both the plaintiff's and defendant's houses, taking the water from both. The cause was tried at Liverpool, before Baron *Bramwell*, when a verdict was entered for the plaintiff, and a motion was made to enter a verdict for defendant in pursuance of leave reserved at the trial.

The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were converted into two houses by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that conveyance the plaintiff took a conveyance of *his* house. At the time of the respective conveyances the drain ran under the plaintiff's house and then under the defendant's house, and discharged itself into the common sewer. Water from the eaves of the *defendant's* house fell on the *plaintiff's* house, and then ran into the drain on plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was proved that, by the expenditure of six pounds, the plaintiff might stop the drain and drain directly from his own land into the common sewer. It was not proved that the defendant, at the time of his purchase, knew of the position of the drains.

Under these circumstances we are of opinion, upon reason and upon authority, that the *plaintiff* is entitled to our judgment. We think that the owners of the plaintiff's house are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with reason, that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. If that were not so, the inconveniences and nuisances in towns would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole. The authorities are strong on this subject. In *Nicholas* v. *Chamberlaine*, Cro. Jac. 121, it was held by all the court

that, "if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to his house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, *because it is necessary and quasi appendant thereto*, and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So if a lessee for years of a house and land erect a conduit upon the land, and after the term *the lessor occupies them together for a time*, and afterwards sells the house with the appurtenances, to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them." *Shury* v. *Pigott*, Popham, 166; s. c. 3 Bulst. 339; and the case of *Coppy* v. *I. de B.*, 11 Hen. 7, 25, pl. 6, support this view of the case, that where a gutter exists at the time of the unity of seisin of adjoining houses it remains when they are aliened by separate conveyances, as an easement of necessity.

It was contended, on the part of the defendant, that this pipe was not of necessity, as the plaintiff might have obtained another outlet for the drainage of his house at the expense of six pounds. We think that the amount to be expended in the alteration of the drainage, or in the constructing a new system of drainage, is not to be taken into consideration, for the meaning of the word "necessity" in the cases above cited, and in *Pinnington* v. *Galland*, 9 Exch. 1, is to be understood the necessity at the time of the conveyance, and as matters then stood without alteration; and whether or not at the time of the conveyance there was any other outlet for the drainage water, and matters as they then stood, must be looked at for the necessity of the drainage.

It was urged that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or ought to have known that some drainage then existed, and if he had inquired he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. Gale (Gale on Easements, p. 53, 2d ed.) that by "*apparent signs*" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase; and therefore we think the rule must be discharged.

Rule discharged.[1]

[1] See *Dunklee* v. *Wilton R. R. Co.*, 24 N. H. 489; *Seymour* v. *Lewis*, 2 Beasl. 439.

WORTHINGTON *v.* GIMSON.

QUEEN'S BENCH. 1860.

[*Reported* 2 *E. & E.* 618.]

THE declaration stated that plaintiff was possessed of a messuage, farm, buildings, garden, and land, with the appurtenances, and by reason thereof was entitled to a way from the said messuage, &c., unto, into, through, over, and along certain land of defendant, for plaintiff and his servants, &c., yet defendant obstructed the said way.

Pleas. 1. Not guilty. 2. That plaintiff was not by reason of his possession of the said messuage, farm, buildings, garden and land, with the appurtenances, entitled to the alleged way in the declaration mentioned, in manner and form as alleged.

Issues thereon respectively.

At the trial before *Williams*, J., at the Leicestershire Summer Assizes, 1859, it appeared that the plaintiff was the occupier of a farm and house at Naneby, a hamlet of Market Bosworth, in the county of Leicester; and that he also occupied therewith two closes in the adjoining parish of Newbold Vernon. These two closes adjoined part of a farm occupied by the defendant under Sir W. Hartopp, and situated in Newbold Vernon. The way mentioned in the pleadings passed from the plaintiff's farm buildings across one of his said closes in Newbold Vernon, and then across the farm of the defendant. It was proved that the way had been used by the plaintiff and his father, who occupied the farm before him, for more than forty years, and that it had been rendered impassable by an obstruction caused by the defendant in January, 1859. It appeared that, since the date of the partition-deed hereafter mentioned, the owner of the farm occupied by the defendant had been only a tenant for life. For many years prior to January, 1820, the owners of the two farms had been jointly interested in them, the late Sir E. C. Hartopp being seised of one undivided moiety, and the late Mr. John Pares of the other. In January, 1820, a partition deed was entered into between Sir E. C. Hartopp and Mr. John Pares, whereby the Newbold Vernon portion of the land, with the exception of the two closes before referred to, were conveyed to the use of the Hartopp family, and the Naneby portion, together with the said two closes, were conveyed to Mr. John Pares absolutely. The last-mentioned estate came by sale into the possession of one Harris, who was the owner of it at the time this action was brought. The way had existed and had been used for many years by the occupiers of either farm; but there was no express reservation in that part of the partition-deed by which Mr. Pares granted his undivided moiety. The grant by the same deed, by Sir E. C. Hartopp, of his undivided moiety

in the Naneby estate to Mr. Pares, conveyed, with other farms, that occupied by the plaintiff, "with their and every of their rights, members, easements, and appurtenances." The jury found that the occupiers of the Naneby farm had enjoyed the way as of fact up to and before the deed of partition, and also that the way had been enjoyed for twenty years since the partition-deed up to the time of the obstruction. The learned judge, notwithstanding this finding, nonsuited the plaintiff, reserving to him leave to move that the verdict should be set aside, and a verdict with nominal damages entered for him instead thereof.

Mellor obtained a rule to that effect.

Macaulay and *Phipson* now showed cause.

Mellor and *Field* in support of the rule.

WIGHTMAN, J. I am of opinion that this rule must be discharged. The question is, whether the right of way claimed by the plaintiff passed under the deed of partition. I think that the ground upon which *James* v. *Plant*, 4 A. & E. 749, was decided, is conclusive on this question. For it is clear that had not the words "all" "ways, paths, passages," "and appurtenances whatsoever" "belonging or in any wise appertaining," to the premises conveyed, "or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof," been inserted in the deed there before the court, no way would have been held to pass under the word "appurtenances" in the *habendum*, but one which was a way legally incident to the enjoyment of the property. The insertion of those words, however, led the court, I think rightly, to the conclusion that the word "appurtenances" was capable of receiving a more enlarged meaning from the context, and was, consequently, "not confined to that which is in legal strictness an appurtenant, such as an easement, the enjoyment whereof has never been interrupted by unity of possession or extinguished by unity of seisin, but that it" would "let in and comprehend the right of way which" had been "usually held, used, occupied, or enjoyed, with the" "estate, as" "expressed in the operative part of the deed itself." They added, "The deed itself forms a glossary for the word, by which glossary it is to be interpreted." If we could discover from the deed in the present case any words indicating an intention to pass other than legal incidents to the property as "appurtenant" thereto, we might put a construction upon it in favor of the intention. But there are no such words to be found in the deed. It is also said that this case is one of that class of which *Pyer* v. *Carter*, 1 H. & N. 916, is an instance, in which the enjoyment of an easement over property has been held to pass by implication, as an apparent and necessary part of the grant of the property. In *Pyer* v. *Carter* it was held that the purchaser of a house was entitled, without any express reservation or grant, to the use of a drain running from it under an adjoining house; on the ground that he purchased the house as it was, and

that the use of this drain was necessary to it. The principle of that case would have been applicable to the present, had there been any proof that the way now in dispute was a way of necessity. But such proof is wholly wanting.

CROMPTON, J. I am of opinion that my Brother Williams was quite right at the trial, and that we cannot enter the verdict for the plaintiff upon the findings of the jury. We are asked to do so upon the finding that there had been an actual use of the way, up to the time of the partition; although it is not found that the way was used of necessity. Mr. Gale, in his work on Easements, states very clearly the class of easements which pass by implication. At page 76 (3d ed.) he says, "Where such easements are in their nature continuous and apparent, they pass upon a severance of the tenements by implication of law, without any words of new grant or conveyance. Indeed properly speaking, such easements are not revived, but newly created, by an implied grant." "The same observation applies to easements, commonly called 'of necessity.'" He adds: "Other easements, such as ordinary rights of way, will not pass upon a severance of the tenements, unless the owner 'uses language to show that he intended to create the easement *de novo*.'" The last words of this passage are those of Bayley, B., in *Barlow* v. *Rhodes*, 1 C. & M. 448; in which case a question was raised, which does not here arise, whether parol evidence was admissible in explanation of the terms of a deed of grant. We are also asked to say that the way in dispute in the present case passed under the word "appurtenances" in the deed of January, 1820. But in *James* v. *Plant*, 4 A. & E. 749, which is relied upon in support of that contention, language was used in the deed of partition which showed that the intention of the parties was that the way should pass, and the court held that the subsequent general word "appurtenances" might be properly construed in a sense wide enough to give effect to that intention. In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute, and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be very naturally supposed to have been the intention of the parties that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease.

HILL, J. I am of the same opinion. I found my judgment upon this, that there is nothing in the deed to indicate that the parties

intended to use the word "appurtenances" in any other than the strict legal sense of the word; and that the right of way claimed by the plaintiff is not within that sense. *Rule discharged.*[1]

WHITE *v.* BASS.

EXCHEQUER. 1862.

[*Reported* 7 *H. & N.* 722.]

THE first count of the declaration stated that the plaintiff, before and at the time of the committing of the grievances, &c., was and from thence hitherto hath been and still is lawfully possessed of a certain messuage, dwelling-house, and beer-shop, in which said messuage, &c., during all the time aforesaid, there were and still of right ought to be divers ancient windows, through which the light and air, during all the time aforesaid, ought to have entered, and until the committing of the said grievances did enter and still of right ought to enter into the said messuage, &c., for the convenient and wholesome use, occupation, and enjoyment thereof. Yet the defendant, contriving to injure the plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of the said messuage, &c., wrongfully and injuriously erected and raised, and caused and procured to be erected and raised, a certain wall and building near to the said windows, and wrongfully and injuriously kept and continued the said wall and building so then erected and made for a long time, to wit, from thence hitherto, by means of which premises the said messuage, &c., during all the time aforesaid, was and still is greatly darkened, and the light and air were and are hindered and prevented from coming and entering into and through the said windows into the said messuage, &c., and the same hath thereby been rendered and is close, uncomfortable, unwholesome, and unfit for habitation, or for the purposes of the plaintiff's business of a beer seller, &c.

Second plea. — That in the said messuage, &c., there were not at the said time when, &c., divers ancient windows, or any ancient windows through which the light or air ought to have entered as alleged. Issue thereon.

By consent of the parties and order of a judge the following case was stated for the opinion of this court: —

[1] See *Pebbles* v. *Eastard*, 4 B. & S. 258; L. R. 1 Q. B. 156 (case under a will); *Peters* v. *Humphreys*, 18 N. J. Eq. 260; 19 N. J. Eq. 471 (also under a will); *O'Rorke* v. *Smith*, 11 R. I. 259; *Parsons* v. *Johnson*, 68 N. Y. 62. But cf. *Kieffer* v. *Imhoff*, 26 Pa. 438; *M'Clurg* v. *Kitchenman*, 47 Pa. 239; *Phillips* v. *Phillips*, 48 Pa. 178; *Coulter* v. *Upshaw*, 69 Pa. 110; *Cramer* v. *Reed*, 73 Pa. 179; *Zell* v. *Universalist Soc.*, 119 Pa. 390. In these Pennsylvania cases an alley is regarded as a continuous and apparent easement.

The action is brought to recover damages for the obstruction of the light and air coming to the windows of a beer-shop of the plaintiff, by the defendant building on the adjoining land. The pleadings, and also the lease and conveyances hereinafter referred to, are to be taken as part of this case.

The plaintiff's house had stood for upwards of twenty years before the nuisance complained of, during all which time there has been free and uninterrupted access of light and air to the windows in question.

Prior to the 2d day of October, 1855, the plaintiff's house, and the land on which the defendant has built, belonged to W. Erwood and E. Carter, who were seised thereof in fee.

On that day the said W. Erwood and E. Carter leased the land on which the defendant has built to G. Payne, G. Arney, and E. Hampson, described in the lease (as in fact they were) trustees of Price's Workmen's Stores Industrial Society, for ninety-nine years from the 29th September, 1855, in which lease was contained the following covenants: And also that the said G. Payne, G. Arney, and E. Hampson, their executors, &c., shall, within the space of nine calendar months from the date hereof, build upon the said piece or parcel of ground one good and substantial storehouse, messuage, or tenement and buildings, &c., according to the plan, elevation, and specification this day signed by the said parties hereto. And also shall not erect or build any other building on the said ground hereby demised other than the said messuage or tenement, &c., mentioned and described in the said last-mentioned plan, without the license and consent in writing of the said W. Erwood and E. Carter, their heirs, &c. But it shall be lawful for the said G. Payne, G. Arney, and E. Hampson, their executors, &c., from time to time during the said term to make alterations in the said messuage or tenement, &c., so that the same shall not in any way be diminished in value.

Up to the time at which the said lease was made, there had not been, so far as can be traced, any severance either in the title to or possession or occupancy of the said land and house, and the same had been occupied and used together by the proprietor or proprietors thereof for the time being for upwards of fifty years.

On the 31st day of December, 1856, the said W. Erwood and E. Carter, being then the owners in fee simple both of the said house and land, but subject as to the land to the said lease, conveyed the land to the said G. Payne, G. Arney, and E. Hampson, trustees as aforesaid, in fee simple,[1] and the fee has from that time hitherto been vested in them.

[1] The indenture of the 31st of December, 1856, after reciting (*inter alia*) that W. Erwood and E. Carter had "contracted and agreed with the said G. Payne, G. Arney, and E. Hampson for the absolute sale to them of the piece or parcel of ground" thereinafter described, witnessed "that in pursuance of the said agreement and in consideration of the sum of £240 sterling, on or before the execution of these presents, paid," &c., "they, the said W. Erwood and E. Carter, do and each of them doth grant, bargain, sell, release, and convey unto the said G. Payne, G. Arney, and E.

On the 6th day of May, 1857, the said W. Erwood and E. Carter conveyed the plaintiff's house to J. Griffin in fee simple, under whom the plaintiff had before the grievances complained of become, and has since continued to be and is, entitled to the possession of the said house.

Subsequent to the conveyance in fee to the said G. Payne and other trustees as aforesaid, and subsequent to the plaintiff becoming entitled to the said house, the defendant, by the direction or with the authority of the said trustees, who were then and still are possessed of the said land, began to build on the said land so conveyed to the said trustees, and built so as materially to obstruct the light and air coming to the plaintiff's said windows of his said house.

He did not build according to the plan mentioned and referred to in the said lease to the said trustees, but built on another and different plan, which was sanctioned by the trustees. Had he built according to the said plan, the light and air coming to the plaintiff's said windows would not have been obstructed to the same extent as they are by the present building, though such light and air would have been obstructed to some extent.

The question for the opinion of this court is, whether or no the defendant is liable to the plaintiff for obstructing the light and air coming to his said windows; and if the defendant is so liable, whether he is liable for the whole of the said obstruction, that is to say, both for the obstruction of so much of the light and air as would have been obstructed if he had built according to the plan mentioned and referred to in the said lease, and for the excess, or only liable for the excess.

If the court shall be of opinion in the affirmative, judgment is to be entered for the plaintiff on the issues joined on the first count of the declaration for such damages as an arbitrator shall find, and costs, and the arbitrator is to assess the damages either for the whole obstruction or for the excess only, according to the judgment of the court.

If the court shall be of opinion in the negative, judgment is to be entered for the defendant on the issue joined on the second plea, with costs applicable to such issue.

Petersdorff, Serjt. (with whom was *Hance*), for the plaintiff.

Lush (with whom was *Fooks*) appeared for the defendant, but was not called upon to argue.

POLLOCK, C. B. I am of opinion that our judgment should be for the defendant. My Brother Petersdorff has cited no authority for the

Hereditaments and their heirs, All that piece or parcel of ground situate, lying, and being on the south side of the York Road, in the parish of St. Mary, Battersea, measuring," &c. (describing the ground by measurement and abuttals), "and which said piece or parcel of ground is, for the better identification thereof, more particularly described in the ground plan thereof drawn in the margin of these presents. Together with all fixtures, outhouses, buildings, rights, members, easements, and appurtenances to the said piece or parcel of ground and premises belonging or appertaining.

precise matter which he has urged before us, and I think that, in construing a conveyance of land, we must collect what the parties intended from the language they have used. It seems to me that we cannot look into the lease of the 2d of October, 1855, for it is merged in the fee, a conveyance of the reversion having been made to the lessees; and we must look to that conveyance alone in order to ascertain the rights of the parties. In that conveyance [page 495] there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the plaintiff's house, nor indeed any limitation of the right to use the land. I therefore think that the present action is not maintainable, and the defendant is entitled to our judgment.

MARTIN, B. I am of the same opinion. The conveyance [page 495] of the reversion in fee of the land to the lessees (who are substantially the defendants) is in the most general terms. My Brother Petersdorff contends, that notwithstanding the grant of the land in those terms, the purchasers are restricted in their use of it, so that they cannot make any erection upon it which obstructs the light and air of the plaintiff's house. I know of no authority for that position. There is an absolute conveyance of the land, which, as against the grantor, gives every right which a grantee would have, that is, to use it in a lawful way.

CHANNELL, B. I entirely agree. The argument for the plaintiff has dwelt a great deal upon the case of *Palmer* v. *Fletcher*, 1 Lev. 122; but that case is explained in *Tenant* v. *Goodwin*, 2 Ld. Raym. 1093, by Lord Holt, who said: "If indeed the builder of a house sells the house with the land and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." I think that is the true view of the case; and it does not conflict with any of the authorities cited. Then the only point for our consideration is, whether, there having been, prior to the conveyance in fee, a lease containing a covenant to build in a particular way, that lease under the circumstances makes any difference. I think that, having reference to the fact that no building was erected under that lease, and looking at the time when the building was erected, viz., after the conveyance in fee, the lease does not affect the case.

WILDE, B. The action is for obstructing the light and air of the plaintiff's house; and it is contended that the defendant had no right to build in the way he has built. Now the title to the land on which the defendant built was obtained from the owners of the house the light of which is obstructed, under a conveyance executed in 1856. There had been a previous lease, but at that time the reversion in fee

was conveyed to the lessees. The question then is whether, the lessees having obtained the fee in 1856, there was anything to prevent them from building on the land. As my Brother Martin observed, the conveyance to them is in the most general terms, and does not in any way purport to restrict them in their use of the land.

Then, if the conveyance does not restrict them, what does? It is said that the owners, who conveyed to them the reversion in fee of the land, having at that time themselves the use of the neighboring house, is a circumstance from which it ought to be implied that in granting, fully and freely as they did, the land, they meant to restrict the grantees in building upon it. No authority has been cited for that position. The only authority that at all approaches that view is the case of *Pinnington* v. *Galland*, 9 Exch. 1; but all that case decided is that the court might, as a matter of law, imply a reservation of a way where it was a way of necessity. To this extent the law has gone: that where the owner of a close surrounded by his land grants the close to another without any express reservation of a way, if there is no other means of getting to the close, the law will imply a way over the grantor's land, as incident to the grant. That is no authority for implying in this case a restriction upon the grantees of the land, that they shall not build upon it so as to obstruct the light and air of the plaintiff's house. If the grantees of the land might have built upon it in 1856, I do not understand how the conveyance of the house in 1857 to the person from whom the plaintiff obtained possession, can alter the case. It may be that the grantors could not derogate from their grant in 1856; but it is impossible to say that the grant in 1857 in any way derogated from the rights granted in 1856. When the facts are understood, this is to my mind a plain case. For these reasons I think that the defendant is entitled to judgment.

Judgment for the defendant.[1]

DODD *v.* BURCHELL.

Exchequer. 1862.

[*Reported* 1 *H. & C.* 113.]

The first count of the declaration stated, that the defendant broke and entered a messuage and land of the plaintiff, situate and being No. 1 Church Terrace, Church Road, Battersea, in the county of Surrey, and pulled down, prostrated, and destroyed an enclosure, lean-to, and door of the plaintiff, parcel of the said messuage and land, and blocked up a door of the plaintiff opening into the same, and erected a doorway and door upon the said messuage and land, and kept the same locked up and fastened over and across a certain passage, parcel

[1] *See Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13.

of the said messuage and land; by means of which premises the back entrance of the plaintiff to his wash-house, garden, and water-closet, parcel of his said messuage and land, from his house and from the high way there was obstructed, and he was deprived of all entrance thereto, except through one of the rooms of the said house, and his said house was thereby lessened in value. — Second count: For that the plaintiff was possessed of a dwelling-house and garden, No. 1, Church Terrace, Battersea, in the county of Surrey, and by reason thereof was entitled to a way over certain land from his said house, and from a street called Church Street into his said garden, and from his said garden over the said land to his said house and to the said street called Church Street; and the defendant by wrongfully fixing a door across the said land, and wrongfully blocking up and fastening the same, prevented the plaintiff from using his said way, whereby his said house and garden became and were lessened in value, and the plaintiff was inconvenienced in the occupation thereof.

Pleas. First: except as to the trespasses in the first count complained of, so far as they relate to a part of the messuage and land in that count mentioned: Not guilty. Second: to the first count except as in the first plea excepted. — That the messuage and land in that count mentioned, except as aforesaid, were not, nor was either of them, the plaintiff's. Third: to the residue of the trespasses in the first count complained of: — Payment into court of 30*s*. Fourth: to the second count. — That the plaintiff was not possessed of the dwelling-house and garden, as alleged. Fifth: to the second count: — That plaintiff was not entitled to the way, as alleged. — Issues thereon.

At the trial, before *Blackburn*, J., at the Surrey Summer Assizes, 1861, the following facts appeared: — The plaintiff was owner and occupier of a house, No. 1, Church Terrace, Battersea. The defendant was owner and occupier of a house called Park Cottage, situate at the back of the plaintiff's garden. The land on which these houses stood was formerly part of a plot of garden ground, which in the year 1842 was conveyed by the then owner to one Jones in fee. Jones built upon it a row of houses fronting the highway called Church Terrace, and he afterwards built Park Cottage at the back of the garden of No. 1, Church Terrace. The access to Park Cottage was from the highway by a passage at the side of No. 1, Church Terrace, and its garden wall. The first floor of No. 1, Church Terrace extended over this passage. There was a door in the side wall of No. 1, Church Terrace, and another door in its garden wall, which opened into this passage. Across the passage, about three feet from the back wall of No. 1, Church Terrace, and at right angles with the door in the garden wall, there was another door. This part of the passage was covered with a slab or "lean-to," which was cemented to the back wall of No. 1, Church Terrace. From this spot the passage up to Park Cottage was uncovered.

In the year 1851 Jones conveyed Park Cottage to the defendant in fee, with a right of way through the passage, by the following descrip-

tion: "All that piece or parcel of ground situate in the rear of a certain terrace called Church Terrace, &c., which said piece or parcel of ground contains the several dimensions and abuttals more particularly shown and delineated in the plan or ground plot drawn in the margin of this deed and therein colored pink, be the same a little more or less, and all that cottage, &c., together with the right of egress, ingress, and regress, at all times, in, by, and through the way or passage colored blue," as the same were then held and enjoyed by Jones. The plan in the margin of the deed described the length of the defendant's land, colored pink, as eighty-seven feet six inches, of which five feet six inches consisted of a part of the passage over which the first floor of No. 1, Church Terrace extended.

In the year 1853, Jones conveyed to the plaintiff in fee, No. 1, Church Terrace, with the garden. The deed purported to convey the whole of that part of the passage over which the first floor of No. 1, Church Terrace extended, and consequently included the five feet six inches already conveyed to the defendant. The plaintiff's conveyance made no mention of any right of way. The quantity of land conveyed to the defendant corresponded with the description in his deed, within a few inches.

In March, 1861, the defendant blocked up the door-way from the passage into the plaintiff's garden. The defendant also removed the door across the passage, and placed across it another door in a line with the back wall of the plaintiff's house, which door he kept locked. He also removed the "lean-to."

Evidence was given on the part of the plaintiff that the occupiers of No. 1, Church Terrace, from the time the house was built, used to go from the house by the side-door into the passage and from thence through the door into the garden, for the purpose of getting to a water-closet. It might, however, be reached by going through a kitchen in which there was a window which opened into the garden. This mode of access was used as frequently as the other. It was admitted that the money paid into court was sufficient to cover any damage done to the plaintiff's walls, and by the removal of the "lean-to."

Upon these facts a verdict was entered by consent for the plaintiff, with 40*s.* damages; leave being reserved to the defendant to move to enter the verdict for him.

Shee, Serjt., in Michaelmas Term, obtained a rule *nisi* accordingly.

Hall showed cause.

Shee, Serjt., and *H. Lloyd* appeared in support of the rule, but were not called upon to argue.

Pollock, C. B. I am of opinion that the rule ought to be absolute. There is a wide difference between that which is substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid

important rights to land being determined by parol evidence and the prejudices of a jury. In some cases it may appear a hardship that a party is not allowed to show that the language of a deed does not express his meaning; but why should a solemn instrument under seal be set aside because certain facts exist from which a jury might infer that the parties did not mean what they have said? It must be admitted that in some cases there have been expressions of regret at the operation of general rules of law. That more frequently occurs in the construction of wills, where the courts have said that although the testator may not have meant what he has written, they must decide according to the language he has used. In the present case, I own, I feel no regret, because the principle contended for is of so vague, uncertain, and unsatisfactory a nature, that it would unsettle questions of real property, by bringing under the consideration and for the decision of a jury matters which it has been the object of those who made the law and those who administer it, to submit to the judgment of a court. For these reasons, and upon principle, I think that the rule ought to be absolute.

MARTIN, B. I am of the same opinion. We must ascertain the right which passed under the deeds. A court, in construing a conveyance, ought, so far as is possible, to put itself in the position of the grantor and grantee, and then read the writing. Having placed itself in that position, it is that which is written which is to determine the rights of the parties. Mr. Holl has cited Gale on Easements, where many of the propositions laid down are founded on the civil law, which is no authority for the administration of the common law of England. There is no sounder principle than this, that, where the parties have put their contract into writing, it is the writing alone which is to guide the courts in putting a construction upon it. It is argued that all the land which the defendant claims did pass to him, because his conveyance describes it of the dimensions and abuttals delineated in a plan, "be the same a little more or less;" but that cannot extend it or diminish it by five feet. Then reliance was placed on the words, "as the same were then held and enjoyed by the vendor," as showing that the right of way was reserved; but I think they cannot so operate. *Pyer* v. *Carter*, 1 H. & N. 916, went to the utmost extent of the law; but, if considered, that decision cannot be complained of, for if a man has two fields, drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the grantee can stop up the drain, for there would be the same right of drainage as before, since the land was sold with the drain in it. I agree with the law as laid down in that case, and I think it may be supported, without extending the doctrine to a right of way.

CHANNELL, B. I am also of opinion that the rule ought to be absolute. It seems to me that the plaintiff is out of court unless this is a way of necessity, and upon the facts I am of opinion that it is not. The plaintiff's claim is founded on this, that he is the owner of the soil

of a part of the passage colored pink, and that it was not conveyed to the defendant. There is some ambiguity in the defendant's conveyance, but its meaning is explained by the plan. It describes the land conveyed to the defendant as eighty seven feet six inches, of which five feet six inches consist of part of the passage. According to that measurement the conveyance is substantially correct, and there is a mere inaccuracy, which is obviated by the words "be the same a little more or less."

WILDE, B. A right of way may exist by prescription, grant, or necessity. It is not suggested that there is any right by prescription. Then, is there by grant? There is a grant of the adjoining land, but without any express reservation of the way, or any words from which it can be inferred that the plaintiff was to have the right claimed by him. Mr. Holl was therefore compelled to resort to the third class, viz., a right of way by necessity; and he cited several authorities to show that where a right of way must exist by necessity, it may be implied, though not reserved in a deed. Then, was this a way of necessity? It appears that at the time of the grant, in respect of which the right of way is claimed, there was a way from the house into the garden, and that way now exists. But it is said that the way now claimed is more convenient than the other. Then comes the question whether the plaintiff can claim it as a way of necessity on account of its great superiority over the other way. It seems to me that it would be most dangerous to hold that where a deed is silent as to any reservation of a way, because it is more convenient to use than another way, it must exist as a way of necessity. There is no foundation whatever for such a doctrine.

For these reasons, upon the first point I am clearly of opinion the rule ought to be absolute to enter the verdict for the defendant.

Upon the second point I say nothing, as I did not hear the whole of the argument for the plaintiff. *Rule absolute.*

SUFFIELD *v.* BROWN.

CHANCERY. 1863.

[*Reported* 4 *De G. J. & S.* 185.]

THIS was an appeal by the defendant from a decree of the Master of the Rolls, whereby his Honor granted without costs a perpetual injunction restraining the appellant from preventing or interfering with the full use and enjoyment of the dock, hereinafter referred to, by the plaintiffs in the manner the same had theretofore been used, by allowing the bowsprit of any vessel in the plaintiffs' dock to overlie or overhang a certain specified portion, to be marked out by metes and bounds,

of the appellant's wharf, also hereinafter referred to, with liberty to apply.

The plaintiffs were respectively the owners in fee and lessees of a dock situate on the Thames at Bermondsey, and used for repairing ships, principally sailing vessels.

The appellant was the owner in fee of a strip of land and coal wharf adjoining the dock, on which he had begun to build a warehouse.

The plaintiffs filed the bill in this suit for an injunction to restrain such building, on the ground that when their dock was occupied by a vessel of large size, her bowsprit must project over the boundary fence of the dock, across the appellant's premises, which it could not do if the appellant's building should be erected, and that they had a right to restrain such building, because it would deprive them of an easement or privilege which they were entitled to use or exercise over the land of the appellant.

The plaintiffs put their case upon possession and enjoyment of the privilege claimed by them of sufficient duration to create a legal title. The Master of the Rolls decided, and in the judgment of the Lord Chancellor (from whose judgment the present statement of the facts is in the main taken) correctly, that the plaintiffs had not proved a possession or enjoyment sufficient to create a legal title to an easement; but his Honor nevertheless granted an injunction in the terms above stated.

Shortly stated, the facts of the case were as follows: —

From the year 1841 until the month of June, 1845, a person named Knox was the owner in fee, and also the occupier, both of the dock and of the adjoining strip of land and coal wharf; and the evidence proved that during such period whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across the adjoining strip of land.

In the month of June, 1845, the two properties, the dock and the strip of land and coal wharf, were put up for sale by Knox by public auction.

In the description given in the particulars of sale, it was stated that the dock was capable of holding two vessels of large size, and that at low water several vessels, or a steamer of the largest class, could safely lie on "the ways" for repairs.

The strip of land described and sold as a "freehold coal wharf" was stated to be capable of being rendered worth a very large rental by a comparatively small outlay. It was represented, therefore, as an improvable property, and nothing was stated to show that the dock or its owners either then had, or were intended to have, any right or privilege over the adjoining premises.

At the auction, the strip of land and coal wharf were sold to one Gibson, and by the conveyance, which was dated in July, 1845, the vendor (who, at the execution of the deeds, still remained owner of the dock), conveyed the strip of land and coal wharf to the purchaser,

under whom the appellant claimed, in the most unqualified manner in fee simple, "together with all privileges, easements and appurtenances to the premises belonging, and all the estate, right, title, interest, property, claim and demand whatsoever, both at law and in equity, of the vendor, in, to, or out of the same hereditaments and premises, and every part thereof." The dock was afterwards sold and conveyed to other persons, under whom the plaintiffs claimed.

Mr. Selwyn and *Mr. Druce* appeared for the plaintiffs in support of the decree of the Master of the Rolls.

Mr. Baggallay, *Mr. Mellish*, and *Mr. Wickens* for the appellant.

At the conclusion of the arguments, the Lord Chancellor reserved his judgment.

The Lord Chancellor [Lord Westbury], after stating the nature and the facts of the case to the effect of the statement hereinbefore contained, proceeded as follows: —

The conveyance of the coal wharf, therefore, is the grant of a person who was at that time absolute owner of the dock, in respect of the ownership of which the present right is now claimed by his grantees against the coal wharf, and it is very difficult to understand how any interest, right or claim in, over or upon any part of the coal wharf could remain in the grantor, or be granted by him to a third person, consistently with the prior, absolute and unqualified grant that was so made of the coal wharf premises to the purchaser.

Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the subservient property.

It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances.

But this view of the case is not that taken by his Honor the Master of the Rolls.

In the note which has been furnished me of his Honor's judgment, his Honor is represented as saying: — "The ground on which I think he (the defendant) cannot contest this right in the plaintiff is because I think that such projection of the bowsprit from the vessel in the dock is essential to the full and complete enjoyment of the dock as it stood at the time when he, or rather Gibson under whom he claims, purchased the wharf, and that Gibson and he had distinct notice of this fact, not merely from the description contained in the particulars of sale under which he bought, but also because the fact was patent and obvious to

any one, on the ground that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the wharf which I have pointed out." And again, "If, therefore, it be true that the dock can still be used, it is equally true that it cannot be used exactly as it has been heretofore, and my opinion is that this projection of the bowsprit is necessary for the due enjoyment of the dock in the ordinary sense of that term."

The effect of this is, that if I purchase from the owner of two adjoining freehold tenements the fee simple of one of those tenements and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine: I believe it to be of very recent introduction; and it is in my judgment unsupported by any reason or principle, when applied to grants for valuable consideration.

That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement is wholly immaterial, if he buys the fee simple of his tenement, and has it conveyed to him without any reservation. To limit the vendor's contract and deed of conveyance by the vendor's previous mode of using the property sold and conveyed is inconsistent with the first principles of law, as to the effect of sales and conveyances.

Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it on which he has been for years in the habit of throwing out the cinders, dust and refuse of his workshops which would be an easement necessary (in the sense in which that word is used by the Master of the Rolls) for the full enjoyment of the manufactory; and suppose that I, being desirous of extending my garden, purchase this piece of land and have it conveyed to me in fee simple; and the owner of the manufactory afterwards sells the manufactory to another person: am I to hold my piece of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of the judgment before me, I certainly am so subject; for the case falls strictly within the rules laid down by his Honor, and it reduces them to an absurd conclusion.

The first introduction of this extraordinary doctrine appears to have been made in the following manner: —

A learned and ingenious author, the late Mr. Gale, published, in the year 1839, a work of great merit on this subject of easements, in which he derived from the doctrine of the French Code Civil certain rules with which he conceived that the law of England agreed, and inasmuch as these conclusions have been cited with approbation in some recent cases

at common law, and as they form the principal support of the plaintiff's argument, it is right to state and examine them.

Mr. Gale, in the opening of his 4th chapter (page 81, ed. 3), says: "The implication of the grant of an easement may arise in two ways: 1st, upon the severance of an heritage by its owner into two or more parts; and, 2dly, by prescription. Upon the severance of an heritage a grant will be implied, 1st, of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have had no legal existence as easements; and, 2dly, of all those easements without which the enjoyment of the severed portions could not be had at all."

It will be observed that the learned author is not here speaking of easements which are already legally existing before the unity of possession, but of those which he supposes to arise for the first time by implication from the grant.

If nothing more be intended by this passage than to state, that on the grant by the owner of an entire heritage of part of that heritage, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted, there can be little doubt of its correctness; but it seems clear that the learned writer uses the word "grant" in the sense of reservation or mutual grant, and intends to state, that where the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous and apparent or necessary easements out of or upon the thing granted as have been used by the owner for the benefit of the unsold part of the heritage during the unity of possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the *quasi dominant* or *quasi servient* tenement.

But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor.

Consider the easements as if they were rights, members or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner.

Many rules of law are derived from fictions, and the rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations which accompany

such portions when divided among them, or even, as it is used in French law, when aliened to strangers.

But this comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership.

And this observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer* v. *Carter*, 1 H. & N. 916, one of the two cases on which the Master of the Rolls relies.

In *Pyer* v. *Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely, and without reservation, and he subsequently sold and conveyed the remaining house to another person. It appeared that the second house was drained by a drain that ran under the foundation of the house first sold; and it was held that the second purchaser was entitled to the ownership of the drain, that is, to a right over the freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house "such as it is." But with great respect, the expression is erroneous, and shows the mistaken view of the matter; for in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house not "such as it is," but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer* v. *Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the court that the easement was "apparent," because the purchaser might have found it out by inquiry; but the previous question is whether he was under any obligation to make inquiry, or would be affected by the result of it; which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case of *Pyer* v. *Carter* the true conclusion was, that as between the purchaser and the vendor the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority.

But to the earlier cases cited by the court in *Pyer* v. *Carter* as authorities for its decision there can be no objection.

In *Nicholas* v. *Chamberlain*, Cro. Jac. 121, it was decided that if the owner of a house, being also owner of the land surrounding it, make a conduit through part of the land to the house, and then sells the house with its appurtenances, the right to the conduit passes; that is

to say, the court held that the conduit was a thing appertaining to the house, and as such passed under the conveyance; and in the same case it was also decided, that if the owner sell the land, reserving the house, the right to the conduit is reserved, — a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances.

To this case and to the case in the Year Book of the 11th of Henry VII., 25 Pl. 6, *Coppy* v. *J. de B.*, or the case of *Sury* v. *Pigott*, Palmer, 444, there can be no objection; but they do not give any support to the decision in *Pyer* v. *Carter*.

The other case relied on by his Honor, namely, *Hinchcliff* v. *The Earl of Kinnoul*, 5 Bing. N. C. 1, is of a different character, and does not apply to the question of easements reserved by implication or the grant of the *quasi servient* tenement. In that case, there being two adjoining houses, belonging to the same lessor, it appeared that the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house; and it was held that a demise by the owner of both houses, of the first house with its appurtenances, carried with it the right to use the coal shoot, and also a right of way to the coal shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal shoot, — a decision which rests upon the ordinary principle of law, that if I grant a tenement for valuable consideration I also grant a right of way to it through my land, if such way be absolutely necessary for the enjoyment of the thing granted.

This case might have had some application to the present if the dock had been the property first sold, and had been conveyed with all privileges, easements, rights, and appurtenances as then used and enjoyed by the vendor, he being still the owner of the adjoining strip of land and coal wharf; but it is plain that no easements can arise by the necessary operation of a grant, unless it be in the power of the grantor to give such easements.

It is true that there may be two tenements, as, for example, two adjoining houses, so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbor; in which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he retains, that support from the house sold, which is at the same time afforded in return by the former to the latter tenement (which was the case of *Richards* v. *Rose*, 9 Exch. 218); but where the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former tenement, it is severed, and either passed or extinguished by the grant.

It must be always recollected that I have been speaking throughout of cases where (as in the present case) the easement claimed had no legal existence anterior to the unity of possession, but is claimed as

arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both, — which is in my opinion an ingenious but fanciful theory, which is, as to part, not required by, and is as to the other part wholly inconsistent with, the plain and simple principles of English law that regulate the effect and operation of grants of real property.

There is in my judgment no possible legal ground for holding that the owner of the dock retained or had in respect of that tenement any right or easement over the adjoining tenement of the strip of land and coal wharf after the sale and alienation of the latter in the year 1845. I must entirely dissent from the doctrine on which his Honor's decree is founded, that the purchaser and grantee of the coal wharf must have known, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, and that he must be considered, therefore, to have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut down and reduced accordingly. I feel bound, with great respect, to say that in my judgment such is not the law.

But if any part of this theory were consistent with law, it would not support the decree appealed from, for the easement claimed by the plaintiff is not "continuous," for that means something the use of which is constant and uninterrupted; neither is it "an apparent easement," for except when a ship is actually in the dock with her bowsprit projecting beyond its limits, there is no sign of its existence; neither is it a "necessary easement," for that means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all.

But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made.

Therefore I must reverse the decree of the Master of the Rolls, and dissolve the injunction he has granted, and dismiss the plaintiff's bill, with costs.[1]

THOMSON *v.* WATERLOW.

CHANCERY. 1868.

[*Reported L. R.* 6 *Eq.* 36.]

MESSRS. J. & R. FELLOWES were, at the time of the conveyance to the plaintiff hereinafter mentioned, the owners of a farm called High Trees Farm, comprising, among other fields, a meadow called High Trees Meadow, and a close on the south side thereof hereinafter referred to as the defendant's close. On the east of the last-named close lay Red

[1] See *Bankes* v. *Salisbury*, 2 Sm. & G. 2 *n*.

Hill Common, and a road from a gate on the south side of High Trees Meadow led across the defendant's close to another gate opening into Red Hill Common, by which access was given from the common to High Trees Meadow.

The plaintiff purchased High Trees Meadow and other adjoining lands from Messrs. Fellowes, and the conveyance, which was dated the 29th of December, 1862, comprised "all buildings, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, advantages, and appurtenances whatsoever to the said pieces of land, or any of them, appertaining, or with the same, or any of them, now or heretofore demised, occupied, or enjoyed, or reputed or known as part or parcel of them, or any of them, or appurtenant thereto."

The plaintiff was then, and continued to be, the owner of an estate called Blackstones, abutting on the north side of High Trees Meadow, from which he could obtain access thereto.

Subsequently to the plaintiff's purchase the defendant, on the 17th of December, 1863, purchased from Messrs. Fellowes the close over which the road from the common to High Trees Meadow passed, together with other lands.

The defendant, after his purchase, locked the gate across the roadway where it entered High Trees Meadow, and refused to allow the plaintiff to use the road.

The suit was instituted to establish the plaintiff's right to use the road in question. The plaintiff alleged that the conveyance gave him such right of way, and that he had enjoyed it without interruption until the conveyance to the defendant of the close over which the road passed, and prayed a declaration of his right to use the road, with or without carriages or horses, from and to High Trees Meadow, and that the defendant might be restrained from interfering with such user.

Conflicting evidence was given as to the origin and user of the road, the plaintiff insisting that a right of way existed before High Trees Meadow and the defendant's close were united in possession; the defendant contending that the road was made after the unity of possession by Messrs. Fellowes for their own convenience. In the view of the court it was established that the road was made and used by Messrs. Fellowes, or their predecessors in the ownership of High Trees Farm, for their own convenience while owners both of High Trees Meadow and of the defendant's close.

Mr. Baggallay, Q. C., *Mr. Freeling*, *Mr. Fullarton*, and *Mr. Thomson*, for the plaintiff.

Sir Roundell Palmer, Q. C., *Mr. De Gex*, Q. C., and *Mr. Speed*, for the defendant.

Lord Romilly, M. R. The plaintiff, by his bill, asks for a declaration that he, and his workmen and servants, are entitled to use and pass over, either with or without horses or carriages, and without interruption, a particular roadway from and to the lands bought by him.

Two questions are raised: first, whether the right of way existed

before the conveyance was made to the plaintiff; and, secondly, whether the right of way was conveyed to him: — [His Lordship then stated the facts of the case.]

The question is whether, under the general words in the conveyance, the plaintiff is entitled to the right of way claimed by the bill.

It is admitted that this mode of access to the meadow is not a road of necessity. The plaintiff has access to the land from his own property adjoining on the north. Neither does the plaintiff put his case so high as to claim this as a road by prescription, or assert that it ever was a public road; but it is contended that this mode of access was a road which was used by the vendor, and that being so used it passes under the words "all ways now or heretofore occupied or enjoyed," and for this purpose the plaintiff relies on the case of *Plant* v. *James*, 5 B. & Ad. 791.

The decision in that case was founded upon the construction of the deed of conveyance, and the question was, whether the words of the deed, properly construed, were such as to import that an old road which had become merged by unity of possession was restored, and that the vendor intended to create a right of way *de novo*. The words of the deed there are exactly the same as the words of the deed in the present case. The present case differs from it in this, that here no right of way existed prior to the occupation of the Messrs. Fellowes, but it was a road created by them during their enjoyment of the property.

There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties. I do not think that the judges in *Plant* v. *James* intended to lay down that such words of conveyance as were used in that case, and in the present, would constitute the grant of a right of way where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place.

My meaning will be better explained by an example: Suppose the proprietor of a large farmyard, contiguous to and opening on a high road, to possess six fields continuously adjoining each other in a line diverging from the high road, and that for the convenience of cultivating them the owner has been in the habit of carting manure from the farmyard on to the most distant close, and also of conveying the produce of this field through the other fields to the farmyard, and on to the high road. If, in that state of things, the proprietor should sell the most distant field to a gentleman who made it a part of his park which was contiguous to it, and which was still more distant from the high road, does the case of *Plant* v. *James* mean to lay down, that in such a case, if in the conveyance the vendor used the words which are contained in this deed, the purchaser of the field would thereby acquire a right of way from his park through the land of the vendor to the high

road, and through his farmyard? I think nothing less than express words describing such a road would be sufficient for such a purpose. But the case would be very different if the owner of the park had always had a right of way from the park through the six closes to the high road, and had afterwards become the purchaser of those six fields and the farmyard, whereby the right of way had become merged by unity of possession, and if he had afterwards sold the park and the adjoining sixth field to a purchaser, and in the conveyance conveyed to that purchaser "all rights of way now or heretofore used, occupied, or enjoyed;" then these words would point expressly to the ways formerly used. Neither, in my opinion, does the decision in *Plant* v. *James*, if carefully considered in conjunction with the recognized law on this subject, established by a long series of authorities, vary the proposition, that during the unity of possession there is no right of way properly so called, because, of course, the owner can go over his own land whenever he pleases, and accordingly (to use the words of the cases) the previously existing right of way is merged by unity of possession. In that case the question was whether by the conveyance the vendor intended to revive that which had been destroyed by unity of possession. In the case before me there was no previous right of way to be merged; how then can unity of possession create in one case what it suspends in another case, and give to the purchaser of the outlying closes all the same modes of access over the rest of the adjoining property of the vendor which that vendor used before the sale? It is clear that it cannot, on behalf of the plaintiff, be put less high than this, for why should the purchaser be allowed to select one out of half a dozen ways which the vendor was habitually using?

It is obvious, therefore, that if these words were held to create a new right of way, they would give to the purchaser of the outlying field a right of going over the adjoining property of the Messrs. Fellowes in every direction in which they had been accustomed to go from or to the land in question, and that in a case where such access is not necessary for the convenient use and occupation of the piece of land so sold. This evidently could not be the intention of the vendors. The question depends upon the construction of the deed; and it is clear that these words have only a natural meaning belonging to the circumstances of the case, and not a technical meaning extending to every road which the owner may have made for his own temporary convenience. I do not think the words have such a meaning by themselves. I do not think the vendors used them in that sense. I think no case exists which compels me to give them a meaning contrary to that which, in the circumstances of the case, they will properly bear.

The case, therefore, must depend upon this circumstance, whether there was a road used before the vendors held the property; in other words, whether it was an old road which became merged by the unity of their possession, or whether it was simply a road used for their own convenience in managing the property.

On this point a great deal of evidence was given, and the conclusion I have come to after carefully going through it is, that there never was a road used for horses or carts at any time over the spot in question before the possession of the Messrs. Fellowes, the vendors, and that since their possession it has not been used except for the mere personal convenience of the Messrs. Fellowes in the management of their property. It does not appear that there was ever any user of this road or way except by the owners of High Trees Farm, and that only for their own convenience. Such user does not, in my opinion, constitute a right of way, and therefore a right of way does not pass under the words in this conveyance, which can only apply to rights of way then existing or which previously had existed; but as to this road, no man had the right to go over it except the owners, and that word "right" imports that at some time some person other than the owners had the right of going over it, which I am of opinion is disproved in the present case. Any other meaning of the word "right," as applied to a way, is devoid of sense; because, of course, every absolute owner of a property can use it, and go over it in every direction he pleases.

I have considered this case solely as regards the right of horses and carts going over, which I understand to be the sole question in contest. In my opinion this fails, and the bill must be dismissed, and the costs must follow the result.[1]

WATTS *v.* KELSON.

CHANCERY. 1870.

[*Reported L. R.* 6 *Ch.* 166.]

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls, so far as it dismissed part of his bill. The suit was brought to maintain an alleged right of way by the plaintiff over the defendant's premises to the plaintiff's premises, and an alleged right to the uninterrupted flow of water along an artificial watercourse through the defendant's premises to the plaintiff's. The Master of the Rolls decided in favor of the plaintiff respecting the right of way, but dismissed so much of the bill as related to the watercourse, and gave neither party the costs of suit.

The plaintiff and the defendant were the owners and occupiers of two adjoining properties, which, up to January, 1863, belonged to a single owner; but on the 10th of January, 1863, John Graham Foley, the then owner of the two properties, conveyed to the plaintiff the premises in respect of which the easements were claimed, which then consisted of a cottage residence and a large number of stalls for feeding cattle, with a yard and outbuildings belonging thereto, and a few acres of land. The premises were conveyed, together with (amongst

[1] So *Langley* v. *Hammond*, L. R. 3 Ex. 161.

other general words) "all roads, ways (and particularly a right of way through the gateway of the said J. G. Foley, which opens into [here was described one of the closes of the vendor, which had since become the property of the defendant] to a wicket-gate to be erected by the said C. Watts, leading into the hereinbefore described piece or part of garden ground [part of the premises conveyed], which gate and wicket-gate are shown in the plan by the letters A and B), waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed, or reputed as part thereof or appurtenant thereto."

On the 11th of June, 1863, Foley conveyed to one Collins the property over which the easements were claimed. The defendant purchased in 1868 from Collins.

A small natural stream flowed from the defendant's premises to the plaintiff's premises, and at the time of the conveyance to the plaintiff there was near to the house purchased by the defendant, and on the ground purchased, a tank which stopped the natural flow of the water, and an artificial drain or culvert into which the water flowed from the tank through a considerable distance to another tank also in the property purchased by the defendant, and from that tank there were two pipes which conducted the water to the yard of the plaintiff's cattle-sheds, where it could be used by the occupier of the plaintiff's premises for any purpose that he required. This artificial watercourse was originally made for the express purpose of supplying the cattle-sheds with water, and was made by the owner of both properties. According to several of the witnesses it was not originally supplied with water from the upper tank, but from a lower part of the stream. It was admitted, however, that as early as the year 1860 the connection was formed between the upper tank and the drain which conducted the water to the lower tank, and that from that time the lower tank was exclusively supplied with water from the upper tank. Water was thus obtained much more pure than if it was taken from the stream after it had entered the plaintiff's land.

It was alleged by the defendant that the plaintiff having, after he purchased his own property, become in the year 1864 tenant of the property now belonging to the defendant, had altered the upper tank by making a hole in its lower side, and placing an iron hatch over the hole, and that the effect of this was to raise the water in the tank, and to increase the flow of the water through the artificial watercourse. The court, however, came to the conclusion, upon the evidence, that before the iron hatch was placed on the tank there had been a wooden hatch, or some wooden contrivance, which practically served the purpose of raising the water in the tank, so as to cause it to flow freely down the artificial watercourse to the lower tank, and that the plaintiff was not proved to have made any such alteration in the watercourse as could affect any right to the water he might otherwise have.

The cattle-sheds no longer existed on the plaintiff's land, their place being occupied by cottages, and the water being used by the tenants for domestic purposes.

As regards the right of way, the position of the points A and B, which were distant only a few yards from each other, was not in dispute. The gate A was a gate which would admit carriages. The plaintiff, for some time after his purchase, was the tenant of the property subsequently purchased by the defendant. He did not erect a wicket-gate at B, but erected a cart-shed on that part of the piece of garden ground which was nearest to the point B, and used the space between A and B as a way for bringing carts to it. The defendant obstructed this way, alleging that the right granted to the plaintiff by his conveyance was only a right of footway.

The plaintiff filed his bill to establish his right to the use of the water, and to a carriage-way from A to B, and for an injunction to restrain the defendant from interfering with those rights. The Master of the Rolls held that the plaintiff had shown a right to the carriage-way, but dismissed the bill so far as it related to the right of water.

The plaintiff appealed.

Mr. Amphlett, Q. C., and *Mr. T. A. Roberts*, for the appellant.[1]

Mr. Southgate, Q. C., and *Mr. W. Barber*, for the defendant.

The judgment of the court was delivered by

Sir G. Mellish, L. J., who, after stating the facts as to the watercourse, continued: —

The real question to be determined is: Did the indenture of the 10th of January, 1863, convey to the plaintiff any right to the benefit of the artificial watercourse above described? The Master of the Rolls has held, on the authority of *Thomson* v. *Waterlow*, 1 L. R. 6 Eq. 36, and *Langley* v. *Hammond*, L. R. 3 Ex. 161, that, because the artificial watercourse was first made and begun by a person who was owner of both properties, and had no prior existence at a time when the properties were separately owned, the general words in the conveyance were not sufficient to pass the right. *Thomson* v. *Waterlow* and *Langley* v. *Hammond* were both cases of rights of way, and we cannot but think that, in the decision of the Master of the Rolls, the well-established distinction between easements, like rights of way, which are only used from time to time, and what are called continuous easements, has been overlooked. In *Polden* v. *Bastard*, L. R. 1 Q. B. 156, 161, Chief Justice Erle, delivering the unanimous judgment of the Exchequer Chamber, says: "There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognize this distinction, and it

[1] During the argument the Lord Justice Mellish said, "I think that the order of the two conveyances in point of date is immaterial, and that *Pyer* v. *Carter* is good sense and good law. Most of the common law judges have not approved of Lord Westbury's observations on it:" and the Lord Justice James added, "I also am satisfied with the decision in *Pyer* v. *Carter*."

is clear law that upon a severance of tenements easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language shows an intention that they should pass."

We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement extending to the dominant tenement by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement. According to the rule, as laid down by Chief Justice Erle, the right to such an easement as the one in question would pass by implication of law without any words of grant, and we think that this is the correct rule; but if words of grant are necessary, we also think that the general words in this case are amply sufficient to pass the easement. It was a watercourse with the premises at the time of the conveyance used and enjoyed. We may also observe that, in *Langley* v. *Hammond*, Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words.[1] We do not think it necessary to go through the large number of cases cited in the argument, and it will be sufficient to refer to two or three of them.

In the old case of *Nicholas* v. *Chamberlain*, Cro. Jac. 121, it was held by all the court, upon demurrer, that if one erects a house, and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduits and pipes pass with the house, because they are necessary and *quasi* appendant thereto. This case has always been cited with approval, and is identical, not only in principle, but in its actual facts, with the case now before us. It was expressly approved of by Lord Westbury in *Suffield* v. *Brown*, 12 W. R. 356, where, though he objected to the decision in *Pyer* v. *Carter*, 1 H. & N. 916, in which it was held that a right to an existent continuous apparent easement was impliedly reserved in a conveyance by the owner of two houses of the alleged servient houses, yet he seems to agree that a right to such an easement would pass by implied grant where the dominant tenement is conveyed first.

Worrall v. *Brookhurst*, 1 E. & E. 1058, is also a direct authority, that by a grant of a farm with the usual general words the benefit of a culvert and a stream of water running through the lands of the vendor to the farm granted passed; and Lord Campbell says: "The land

[1] So held by Kay, J., in *Brown* v. *Alabaster*, 37 Ch. D. 490 (1887); and see *Thomas* v. *Owen*, 20 Q. B. Div. 225. Cf. also the Pennsylvania cases cited in the note to *Washburn* v. *Gleason*, p. 494, *ante*.

must be taken to be conveyed in the state in which it then was; that is, we must take it that the culvert so bringing down the water and all the watercourses are granted, not only those which belong and appertain to the premises, but also those which were used and enjoyed therewith." This judgment was affirmed in the Exchequer Chamber, and it was held that the defendant was entitled to use the water not only for the farm which was sold to him, but for a manufactory which he possessed beyond.

It was objected before us, on the part of the defendant, that on the severance of the two tenements no easement will pass by an implied grant, except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the watercourse was necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water; and we think it is no answer that, if this supply was cut off, possibly some other supply might have been obtained. We think it is proved on the evidence that no other supply of water equally convenient or equally pure could have been obtained. We are also of opinion, having regard to the general words in the conveyance, that the language of the conveyance was sufficient to pass the right to the watercourse, even if it was not necessary, but only convenient for the use of the premises. It was further objected, that the fact of the plaintiff having pulled down the cattle-sheds and erected cottages in their place, deprived him of the right to the use of water. We are of opinion, however, that what passed to the plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises to his premises, and that when it arrived at his premises he could do what he liked with it, and that he would not lose his right to the water by any alteration he might make in his premises. On the whole, we are of opinion that the judgment of the Master of the Rolls, on the part of the case relating to the watercourse, ought to be reversed, and that the defendant must be restrained by a perpetual injunction from obstructing and diverting the said stream and watercourse, so as to prevent the same from flowing through the defendant's premises to the plaintiff's in the course and manner in which it used to flow at the time of the execution of the conveyance to the plaintiff of the 10th of January, 1863, or in any way preventing or hindering the plaintiff and the tenants and occupiers of his said hereditaments and premises from having the full use and enjoyment of the said stream, and the water thereof, in the manner in which the same was used and enjoyed before and at the time of the said conveyance. We are also of opinion that the plaintiff should have the general costs of suit in the court below, but that there should be no costs of this appeal.

ESPLEY v. WILKES.

EXCHEQUER. 1872.

[*Reported L. R. 7 Ex.* 298.]

THIS was an action of trespass tried at the last Staffordshire Spring Assizes, before *Byles*, J. The defendant pleaded a private and a public right of way. On the suggestion of the learned judge the plea of a public right of way was withdrawn (the defendant giving no evidence upon it), and a verdict was entered for the defendant upon the plea of a private right of way, leave being reserved to the plaintiff to enter the verdict for him if the court should be of opinion that the lease from Lord Stafford, under which the defendant claimed, did not give him a right of way over the land in question, which land had been since leased by Lord Stafford to the plaintiff.

The facts are fully stated in the judgment of the court.

A rule having been obtained by the plaintiff in pursuance of the leave reserved,

A. S. Hill, Q. C., and *Anstie*, showed cause.

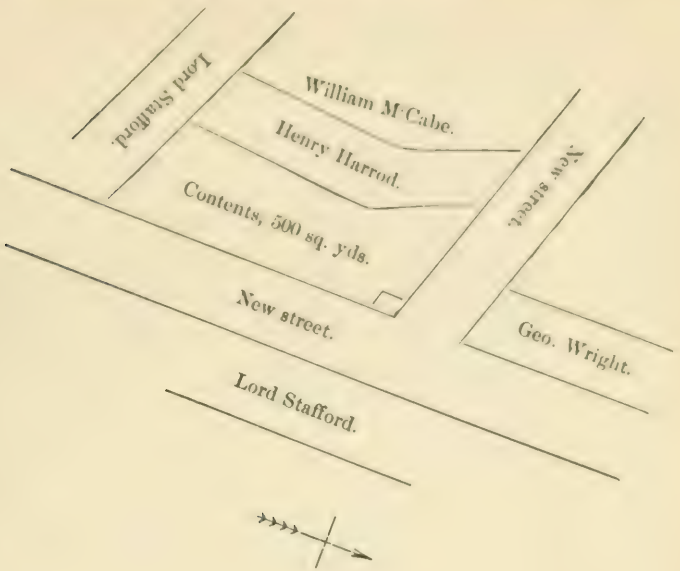
Matthews, Q. C., and *J. O. Griffits*, supported the rule.

Cur. adv. vult.

The judgment of the LORD CHIEF BARON and CLEASBY, B., was delivered by

KELLY, C. B. This was an action of trespass for throwing down a gate. The only pleas we need consider were, 1. a public right of way over the *locus in quo*; 2. a private right of way by grant, such grant being contained in a lease of the 1st November, 1851, for ninety-nine years, from Lord Stafford to one Smith, under whom the defendant claims as assignee of the lease. The premises were described as "all that plot of land situated at Castletown, in the parish of Castlechurch, in the County of Stafford, bounded on the east and north by newly made streets, on the west by premises demised to Henry Harrod, and on the south by land belonging to the said Lord Stafford; containing on the east side thereof forty-five yards, on the west forty-two yards, and north and south twelve yards; a plan whereof is indorsed on these presents, together with all dwelling-houses, buildings, and erections which, during the term hereby granted, shall be erected on the said plot of land; and all ways, waters, watercourses, lights, easements, and appurtenances to the same premises belonging." The lease contained a covenant by the lessee to build upon the land two dwelling-houses, with all necessary outbuildings and fences, and expend thereon £500 at the least; and also "that the lessee shall and will curb

the said causeways adjoining the said land with proper curbstone." The plan indorsed on the lease is as follows: —



In 1851, when the lease was granted, the strips of land to the north and the east, each delineated and described on the plan as "new street," were on the east a piece of rough waste ground, and on the north a piece of land indistinctly marked out as a street or intended street, on the north side of which a house was built or begun. There are now public highways to the west and to the northeast of the intended new street upon the north, and communicating with it; but the intended new street to the east, which terminates to the south in a drain, is still rough ground, and for the most part impassable as a road.

At the trial of the cause the plea of a public way was given up, and the learned judge directed a verdict for the defendant upon the plea of the private way, but with leave to the plaintiff to move to enter a verdict for himself upon that plea also. And the question is, whether it was the effect of the lease to grant to the lessee a private way along the north front and the east front of the house, now a public-house called the "Sir Robert Peel," and built pursuant to the covenant, at the northeast corner of the land demised, within a year or a little more of the date of the lease. This house, where it abuts upon the northeast, has the sharp corner cut off, and presents the base of a triangle towards the point at which the prolongation of the two sides would meet to the northeast of the house. It has a front door opening into the street to the

north, now called Peel Street, and a yard and gate opening into the intended street to the east, where the defendant had been used to receive cart-loads of coal and other articles, until the way round the corner and along the intended street was obstructed by the gate or fence erected by the plaintiff, and to which the trespass for which the action was brought was committed.

The question we have to determine is, whether a private way was granted by the lease of 1851 together with the plan indorsed upon it, and we are of opinion that such was the effect of the lease. The house was built as contemplated by the lease, abutting on each of the two intended new streets; and it is obvious that, unless a grant was expressed or is to be implied in the lease of a way of some kind along both the north front and the east front of the house to be built, it would be impossible for the lessee to bring materials for the building which he had covenanted to erect upon the land, or to go into or out of his house on the north side or the east side whenever it should be built. And as the land was bounded to the west by land leased to Harrod, upon which a house was also to be built, and on the south by land of the lessors from which there was no approach or access to the land leased, the house so covenanted to be erected, now the "Sir Robert Peel," could not be built at all; and if or when built, would be absolutely unapproachable and inaccessible. It must, therefore, have been intended by the parties that there should be either a public way, or a private way, or a way of necessity. Now the claim to a public way was properly given up at the trial, inasmuch as it is clear that no public way existed to the east or to the north of the intended house at the time of the lease; and although it may be inferred from the delineation upon the plan of what were called "new streets" to the east and to the north that it was intended by both lessor and lessee, and indeed expressed in the lease, that there were to be streets then made or afterwards to be made, and though it is possible that a covenant might be implied that new streets should there be made, there is nothing in the lease to bind the lessor to make them public streets, or to dedicate them to the public; and it was competent to him to make them into private streets for the use only of the lessees of the houses to be built upon the lands demised. The existence of a public way being thus negatived, it was contended by the learned counsel for the plaintiff that all that could be inferred or deduced from the lease and the facts of the case was, that the lessee had acquired a way of necessity. But a way of necessity exists only where the land conveyed or demised is surrounded by other lands of the grantor, and cannot be approached but by a way over the grantor's land where no way exists, and which thus becomes a way of necessity. But here the lessor, by the grant, has expressly described the land demised as abutting upon strips of land of his own to the north and the east, which he himself in the lease describes as newly made streets, and which are distinctly delineated upon the plan, and therein called "new streets." The lessor, there-

fore, is estopped from denying that there are streets which are in fact ways, which ways run along the north and the east fronts of the houses to be built on the demised lands, including the defendant's house, and of which streets or ways the way claimed in the plea to this action is a part.

We should have thought this point clear upon the obvious and necessary construction of the lease and plan; but the case of *Roberts* v. *Karr*, 1 Taunt. 495, is a direct authority to that effect. There one Pratt granted a piece of ground to Compigné (under whom the defendant claimed), described as abutting east on a new road. It appeared that between a public road and the abutment in question there was a strip of land, the property of the grantor, but upon which no road existed at the time of the grant. The defendant pleaded a public right of way over this strip of land, and it was held that the grantor and those claiming under him were concluded or estopped from denying that there was a road or way over this piece of land: Mansfield, C. J., observing in the judgment delivered, "If you (the lessor) have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road." And Lawrence, J., observes, "If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?" Here the land is described as abutting upon "newly made streets," and the case is an authority to show that the grantor is estopped from denying that the strips of land, his property, are what he describes them to be, that is to say, "streets," which they cannot be unless there be a way through and along them. *Harding* v. *Wilson*, 2 B. & C. 96, cited in argument for the plaintiff, is in effect also an authority for the defendant. There a piece of land was granted "abutting upon an intended way 30 ft. wide;" and the land was underlet, the abutment being described as "upon an intended way," but not mentioning the width of thirty feet. It was held that the underlessee was entitled to a convenient way, though not of the width of thirty feet.

But the covenant by the lessee that "he shall and will curb the causeways adjoining the said land with proper curbstone" is conclusive to show that a way was to exist along the north and east fronts of the land demised. The "causeways" are in fact the "newly made streets" mentioned in the lease and delineated on the plan; and a causeway is a way; and the defendant could not curb the causeways without treating them and using them as ways.

Upon these grounds we are of opinion that a way, as pleaded, was granted by the lease; that the plea was proved and properly found for the defendant; and that the rule should be discharged. The defendant has contented himself with a claim to a footway. It may, however, prevent future litigation to observe that it is clear upon the facts before us, that he is equally entitled to a carriage-way over the *locus in quo*.

CHANNELL, B. I have not been free from doubt upon this case, but I do not dissent from the conclusion arrived at by my Lord and my Brother Cleasby.

Rule discharged.[1]

KAY *v.* OXLEY.

QUEEN'S BENCH. 1875.

[*Reported L. R.* 10 *Q. B.* 360.]

CASE stated by an arbitrator, after verdict, taken by consent, for the plaintiff.

The action was brought to try the right of the defendant to obstruct a way which the plaintiff claims a right to use over defendant's land for certain purposes.

The following are the material parts of the case: —

On and previous to the 1st of May, 1860, the defendant was the owner in fee of a dwelling-house, together with the cottage, stable, outbuildings, and garden thereto belonging, now the property of the plaintiff, and called "Roseville," situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, abutting upon a public highway called Horse Shoe Lane, leading from Leeds to Seacroft; and defendant was also the owner in fee of an adjoining farmstead and farm called Rose Cottage Farm, abutting also upon the same highway, and having a private farm road leading from it to the farm buildings, stack-yard, and other premises connected therewith, and to a field adjoining them.

By an indenture of lease, dated the 1st of May, 1860, defendant demised Roseville to R. J. Hudson for a term of ten years from that date, together with "all and singular the rights, privileges, easements, advantages, and appurtenances whatsoever to the said messuage and premises thereby demised, belonging, or in anywise appertaining or therewith used or enjoyed."

At the time of the demise the stable had no upper story, and was of the same height as the adjoining cottage demised with it.

Hudson entered at once into possession, and in the same year built at his expense a hay chamber or upper room over the stable, with two square openings in the east wall of the chamber, of the respective dimensions of 4 ft. 7 in. by 2 ft. 1 in., and 2 ft. 10 in. by 2 ft. 10 in., for the purpose of getting his corn, hay, and straw into his hay chamber, and for which purpose they were adapted. Both openings were fitted with shutters, and the shutters to one of them opened outwards. There were no other means for the admission of light and air into the chamber except a man-hole, 2 ft. 6 in. by 2 ft. 1 in. square, cut through the south-east corner of the floor.

[1] See *Fay* v. *Union Sugar Refinery*, 109 Mass. 292; *Williams* v. *Boston Water Power Co.*, 134 Mass. 406. Cf. *Hoar* v. *Alger*, 4 Allen, 206.

The east wall and the openings abutted upon and looked into the stack-yard and adjoining premises of Rose Cottage Farm; and there was no access to them with carts and wagons out of any part of the premises demised to Hudson, and the only way by which carts and wagons could be brought up to them was by taking them along the private farm road of Rose Cottage Farm.

Before making these alterations, Hudson consulted the defendant and Robert Barber, who was then the defendant's tenant of Rose Cottage Farm, upon them, and obtained their consent to them, and, at the same time, their permission to use Rose Cottage Farm private road to get to the hay chamber, when completed, with his cart and wagon loads of hay, corn, and straw.

No openings were made in the opposite or west wall of the hay chamber.

The lessee Hudson remained in occupation of Roseville and premises until about March, 1863, when he sublet them to a Mrs. Fletcher, who remained in occupation twelve months; and on her quitting them, Hudson sublet them to Richard Green, who remained in occupation up to the expiration of the aforesaid lease of 1860, and was in actual occupation and using the defendant's farm road, as Hudson had done, to get hay and corn into the hay chamber, at the time when the plaintiff purchased from the defendant, as hereinafter mentioned.

In 1868, the defendant entered into the occupation of Rose Cottage Farm himself, and has continued to occupy it to the present time, having a bailiff residing in the farmstead; and he has been all along and still is the owner of it.

All the time Hudson and his under-tenants were in occupation of Roseville they respectively used the defendant's private farm road with their carts and wagons to get their hay, corn, and straw into the hay chamber, and were never interrupted or interfered with by the defendant or his tenants or servants.

The permission which the defendant gave to his lessee Hudson before building the hay chamber was never withdrawn, but on a few occasions the servants of Hudson and Green asked permission of the defendant's tenant and bailiff to use the road.

In May, 1870, the plaintiff agreed with the defendant to purchase Roseville: and by a conveyance dated the 2d of August, 1870, defendant conveyed to plaintiff in fee "all that messuage or dwelling-house, with the outbuildings, conservatory, gardens, and pleasure grounds thereto belonging, called Roseville, situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, and abutting upon Horse Shoe Lane, leading from Leeds to Seacroft; And all that cottage, stable-yard, outbuildings, and close of land adjoining the said messuage or dwelling-house; Together with all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, and rights of way, waters, watercourses, drains, cisterns, lights and rights of light, liberties, privileges, easements, advantages, and appurtenances whatsoever

to the said messuage or dwelling-house, cottage, land, and hereditaments, or any of them, appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto."

At the time of the conveyance the hay chamber, with the two openings in the east side, stood precisely as it had been erected by Hudson.

The plaintiff entered into possession, and began at once to use the defendant's farm road to bring his carts and wagons up to the openings in the hay chamber, and so to get his hay and straw into the chamber, and continued to do so without interruption up to May, 1873, when, and ever since, he has been refused the use of the road by the defendant.

As things were at the time of the purchase by the plaintiff and now are, the plaintiff had not, nor has he now, any way of putting hay, corn, and straw into his chamber except by using the defendant's farm road, or incurring expense in the necessary alteration of his buildings and premises which he purchased from the defendant.

The question for the court was, whether the plaintiff has a right of way over the defendant's private farm road to and for the use of his hay chamber for the purposes mentioned or any or either of them, either by virtue of or ancillary to the conveyance of 1870.

J. W. Mellor (*Dugdale* with him), for the plaintiff.

Herschell, Q. C. (with him *W. J. E. Bennett*), for the defendant.

BLACKBURN, J. I think when we come to understand this case that the plaintiff is entitled to the right of way. The facts are these: the plaintiff purchased Roseville of the defendant, and the defendant by the deed conveyed to the plaintiff the lands and hereditaments, together with all, &c. [The learned judge read the clause.] It is not disputed that if the conveyance had stopped at the word "appertaining," the plaintiff's case might not have been sustainable, but it goes on to add the words: "or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto." We have now to look at the facts in order to see whether the particular right of way in question was in fact occupied or enjoyed or reputed as appurtenant to Roseville. Mr. Herschell says that, where a man is occupier of two adjoining pieces of land, and uses both for the convenience of himself as the actual occupier of both, anything that he may do on the one is *prima facie* not a right appurtenant to the other, and would not pass as appurtenant; and that when he passes across the one close to the other, he exercises the right of going from one to the other merely for his convenience as occupier of the two, and that he does not *prima facie* enjoy or occupy the way as appurtenant to the other, and that the way would not pass as a right enjoyed or as appurtenant. But though that may *prima facie* appear to be the case; yet if there be acts of ownership and user of a road by a man across land for the enjoyment and exclusive convenience of himself as occupier of the

adjoining lands, notwithstanding the cases cited, I do not think, in point of law, we can say that the fact of the road having been so enjoyed and occupied only during the time he had unity of possession or unity of seisin prevents it being enjoyed as appurtenant.

The first case relied on for the defendant is *Thomson* v. *Waterlow*, Law Rep. 6 Eq. 36, 41, before the late Master of the Rolls; and I cannot help thinking that he must have been misunderstood. He is reported to have said: "There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties." I quite agree that there is a distinction. The way which had existed previously to the unity of possession, and which still continued to exist, is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way it would require to be seen whether it had been so used and enjoyed. Then the Master of the Rolls continues: "I do not think that the judges in *James* v. *Plant*, 4 Ad. & E. 749, intended to lay down that such words of conveyance as were used in that case and in the present would constitute the grant of a right of way, where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place." Taking that as the rule to be applied as to matter of fact, I think it is a sound one. I think whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used or enjoyed as appurtenant to the premises — it was used for the convenience of the man who was the occupier of the two, and when he ceases to be the occupier of the two, I think it is no longer appurtenant. That, I think, is a sound rule. And though the facts of the case before the late Master of the Rolls are not set out, I presume they were such as to show that the right of way said to pass was for the convenience of the person so long as he was the occupier of the whole premises to which and over which the way went. Looking at it in that view, it would seem to have been a sound enough decision.

In *Langley* v. *Hammond*, Law Rep. 3 Ex. 168, the Lord Chief Baron is reported to have laid it down as matter of law: "Since it does not appear here that at any antecedent time," that is, before the unity of possession, "there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words" (together with all ways used or enjoyed therewith) "cannot make or revive a right of way that never before existed." And then he goes on to cite what I have read from the judgment of the Master of the Rolls in *Thomson* v. *Waterlow*, Law Rep. 6 Eq. 41. No doubt the Lord Chief Baron so lays down the law; and if that had been the

decision of the Court of Exchequer, we should have been bound by it, and we must have left the question whether it was right or no for the Court of Error. But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right. If the words, as my Brother Lush suggested in the course of the argument, had been "together with the right of way which Green *de facto* has enjoyed of passing over the private farm road," supposing that had been a right of way never enjoyed as of right, but merely a way *de facto* used, still I think the words would have clearly enough created a right of way. I quite agree, where there is a track across the middle of a stack-yard, and the owner sold one side of the stack-yard to enable the purchaser to throw it into his pleasure-grounds, that track across the middle of the stack-yard would not, to use the words of the Master of the Rolls, be a right of way appurtenant to every portion of the stack-yard, but a right of way solely for the convenience of the person who held the whole stack-yard, and which convenience ceased to exist when he severed one part of the stack-yard from the other. That is a good and sound distinction, and taking it in that way, which is the point Martin, B., went upon, I think the decision is perfectly good and right. As to the Lord Chief Baron's *dictum*, I do not think that what the Master of the Rolls said amounted to so much: but if it did, we have the *dicta* of the Lords Justices James and Mellish in *Watts* v. *Kelson*, Law Rep. 6 Ch. Ap. 172, 174, showing that they do not agree in the doctrine. It cannot make any difference in law, whether the right of way was only *de facto* used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right *de novo*, in the other merely revived. But it makes a great difference, as matter of evidence on the question, whether the way was used and enjoyed as appurtenant.

We have now to apply this to the facts of the present case. As a matter of evidence we find it stated in the case that Hudson, the then tenant of Roseville, who held on a lease for ten years, made a hay-loft, with two large openings to admit the hay, which could not be used except by bringing the hay in carts below them along the farm road, and these openings, though not absolutely essential to the use of the hay loft, were extremely important and material for the use of it. Before Hudson built the loft and made these openings, he applied to the defendant, the freeholder of the farm and landlord of Roseville, and obtained his consent to the alterations being made; and at the same time Hudson asked and obtained leave to use the private farm road in question to get the hay and straw in carts to his hay chamber. Hudson remained in occupation of Roseville until March, 1863, when he sublet to Mrs. Fletcher, who remained in occupation twelve months; and on her quitting, Hudson sublet to Green, who remained in occupation up to the expiration of the lease, and was in actual occupation and using

the defendant's farm road as Hudson had done, to get hay, straw, and corn into the loft, at the time when the plaintiff purchased Roseville from the defendant. I do not think it necessary to consider whether or not that parol license, which was given by the defendant to use the road, was revocable; or whether an action might not have been maintained for obstructing the tenant in doing that which he had a parol license to do; or whether an action of trespass could have been brought against the tenant for using that road. I do not think it material to decide that. The license was not in fact revoked. The tenant for the time being of Roseville continued to use the road as appurtenant to it, and had the apparent necessity of using it for the purpose of getting to the two large openings in the loft, exactly in the same way as if the consent of the defendant had been in writing, and a wafer stuck on it. There would not have been the slightest difference in the use and enjoyment of the road. In the one case it would have become appurtenant, and in the other case it would only have been enjoyed as if it were appurtenant. I think in considering the words, we should see what they really mean, and apply them to the state of circumstances existing at the time of the conveyance; and I think this right to carry hay and straw to these two openings was in point of fact then occupied, and enjoyed, and reputed as appurtenant to these premises; and therefore that the plaintiff is entitled to judgment.

LUSH, J. I am of the same opinion. The only question is whether the words of this conveyance manifest an intention that the mode of access which had been used by the tenant of Roseville to the hay loft for the purpose of conveying fodder there, should pass to the plaintiff under that conveyance as a right of way. It is beyond doubt, as a fact, that during the subsistence of the lease, the tenant and his successors had used this way for the purpose of conveying hay and straw, &c., to the hay loft. It was the only mode of access to these openings, and it existed up to the time when the purchase was made by the plaintiff. The conveyance of the house and stable, together with the other premises, has these words, "Together — [The learned judge read the clause]. The latter words were clearly intended to pass, if there were any such thing enjoyed, something not strictly appurtenant to the premises, which could not have been claimed as a matter of right without these larger words. Applying that to the facts as they existed at the time of the conveyance, there was a way which had been used by the tenant for the time being as a mode of access to a part of the premises, namely, the hay loft, and which had been used and enjoyed as if that way had been appurtenant to it, and the language used, I think, expresses, when you come to apply it to the facts, the intention to pass this right of way as specifically as if the conveyance had said "including all the ways and easements to the hay loft as the same have been heretofore enjoyed by Green." That undoubtedly would have passed this way. I certainly was struck with the observation of

Mr. Horsfall, that in none of the reported cases does it appear that the way claimed and held to pass had been newly created as a right by the deed in question. Mr. Horsfall says that in all the cases it appears (and certainly the note in 2 Wms. Notes to Saund. p. 809 n. (c) does justify that position) that there had been originally a right of way appurtenant to the premises which had been suspended, but not extinguished by unity of possession; and the question in all the cases was whether the general words used in the conveyance were intended to revive the right. I certainly was struck with that observation, because I have an impression even now, that there are cases to be found in which rights of way have been thus created by deed. But however that may be, I cannot see anything to prevent the acquisition of such a right by the words used in the present instance. I do not think that we are at all acting in conflict with the decision of the late Master of the Rolls in *Thomson* v. *Waterlow*, Law Rep. 6 Eq. 36. That case is obscurely stated, but I collect from the terms of the judgment that there had been no specific defined portion of the soil appropriated by the owner as a roadway to the severed property as appurtenant to it, but that he had been used to ride across one field in any direction he thought proper in order to get to another field. As to the case in the Exchequer of *Langley* v. *Hammond*, Law Rep. 3 Ex. 161, 168, 170, I think that case is rightly decided, although not on the ground put by the Lord Chief Baron. I prefer the ground on which my Brother Bramwell puts it. Looking, therefore, at the language used, I think it was intended to grant this right of way or access to the hay loft, just as if it had been expressed in terms that it was intended to pass the use of the road as the access to the hay loft, as it had been enjoyed by Green, who had held the premises up to the time of the conveyance.

BLACKBURN, J. With regard to the observation on the older cases, I may add that in *Koogstra* v. *Lucas*, 5 B. & Al. 830, page 833, it does not appear affirmatively whether the right of way claimed had or had not been created before. The judges make no mention one way or the other; but the Chief Justice's direction was that the plaintiff was entitled to the right of way claimed for his cattle to the spot of ground on which he had built his stable and coach-house, "that being a part of the demised premises to which such a way had been used previously to 1814," the date of the conveyance. It might have been that the right of way existed before the unity of possession, but that is certainly not stated affirmatively.

Judgment for the plaintiff.[1]

[1] *See Kirkham* v. *Groll*, 18 Ch. D. 616.

WHEELDON *v.* BURROWS.

COURT OF APPEAL IN CHANCERY. 1879.

[*Reported* 12 *Ch. Div.* 31.]

THESIGER, L. J.[1] The material facts of this case are short and simple. Prior to the month of November, 1875, a person of the name of Samuel Tetley was the owner of certain property in Derby, which included a piece of vacant land having a frontage to the street, and a silk manufactory and certain workshops at the rear of and abutting upon that vacant land, having in one of the workshops certain windows which opened upon that land. Owning this property, Tetley was minded to sell it, and appears to have put it up in several lots for sale by auction; and in respect of some of the lots, including a lot which was afterwards sold to the defendant, the sale by auction was abortive. However, an agreement was made at the auction to sell one of the lots to the plaintiff's husband, and that lot was conveyed to him upon the 6th day of January, 1876, with these general words, "together with all walls, fences, sewers, gutters, drains, ways, passages, lights, watercourses," and the other general words, "easements and appurtenances whatsoever to the said piece of land and hereditaments belonging or in anywise appertaining." The conveyance contains no reservation in express terms of any right to the grantor in respect of his other land. On the 18th of February, a contract was made by which Tetley contracted to sell to the defendant the silk manufactory and the workshop which had the windows opening upon the land previously sold and conveyed to the plaintiff's husband. This action arises from a claim on the part of the defendant to have as of right the light enter into those windows, or, to put it in another way, to prevent the plaintiff from obstructing these windows by building on her land. Upon the matter coming before the Vice-Chancellor, he held that no right in respect of the windows was reserved, either impliedly or expressly, under the conveyance of January, 1876; and, consequently, that the defendant, as privy in estate with the grantor of the land which was the subject of the conveyance, was entitled to no right of light through those windows: in other words, he decided that the plaintiff was entitled to build upon her land, although the result of that building might be to obstruct these lights. I am of opinion, both upon principle and upon authority, that the Vice-Chancellor decided rightly.

We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all

[1] Only the opinion is given.

those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common-sense, viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by and which is to be attributed to Lord Westbury in *Suffield* v. *Brown*, 4 D. J. & S. 185, it appears to me that it has existed almost as far back as we can trace the law upon the subject; and I think it right, as the case is one of considerable importance, not merely as regards the parties, but as regards vendors and purchasers of land generally, that I should go with some little particularity into what I may term the leading cases upon the subject.

The first case to which I refer is *Palmer* v. *Fletcher*, 1 Lev. 122, where the first proposition which I have stated as a general rule was laid down or decided. The other proposition was mooted, but there was a difference of opinion amongst the members of the court upon it, and it was not decided. [His Lordship then read the report.] It appears therefore that upon the proposition that if a man wishes to derogate from his grant or to reserve any right to himself he should state so in the grant itself, there was a difference of opinion in the court, and that point was not decided.

The next case of importance is *Nicholas* v. *Chamberlain*, Cro. Jac. 121. [His Lordship then read the report, calling attention to the words "necessary *et quasi* appendant thereto."] Now if that determination is held to mean that in all cases this doctrine of implied reservation stands upon exactly the same footing as the doctrine of implied grant, I think it will be found that over and over again that has been over-

ruled. But it is clear, as I have already suggested, that to the second rule under which a man is prevented from derogating from his grant there are certain exceptions, one of those being in regard to easements which have been called of necessity; and if *Nicholas* v. *Chamberlain* only decides that point it appears to me to be quite right. That *Nicholas* v. *Chamberlain* was not meant to decide more than what I have suggested is, I think, shown by the next case, *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1093. There Lord Holt, in delivering the judgment of the court, deals with that very point which had been mooted in *Palmer* v. *Fletcher*; and he says, "As to the case of *Palmer* v. *Fletcher*, if, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." I think it will be found that, putting aside the case of *Pyer* v. *Carter*, 1 H. & N. 916, there has been no distinct decision which in any way affects the principle laid down in those clear and distinct terms by Lord Holt.

The next case to which I will refer is *Swansborough* v. *Coventry*, 9 Bing. 305, which has been cited on both branches of the argument addressed to us by Sir Henry Jackson. That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Lord Chief Justice Tindal deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements: he says (*Ibid.* 309), "It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to

obstruct or interrupt the enjoyment of those lights. The principle is laid down by Twysden and Wyndham, JJ., in the case of *Palmer* v. *Fletcher*, 'that no man shall derogate from his own grant.' The same law was adhered to in the case of *Cox* v. *Matthews*, 1 Ventr. 237, by Chief Justice Holt in *Roswell* v. *Pryor*, 6 Mod. 116, and lastly, in the later case of *Compton* v. *Richards*, 1 Price, 27. And in the present case, the sales to the plaintiff and the defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law." It appears to me, therefore, that this is a decision which fortifies the previous decision of Lord Holt.

I now come to *Pyer* v. *Carter*, which seems to break the hitherto unbroken current of authority upon this point, and there can be no doubt that Sir Henry Jackson is justified in saying that if that case is right, this appeal ought to be allowed. That was a case of a somewhat special character. A house was conveyed to the defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the defendant's premises over the plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water when it came on to what were subsequently the plaintiff's premises was conveyed into a drain on the plaintiff's premises, which drain passed through the defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the plaintiff, and upon an obstruction of the drains in the defendant's house, which, be it observed, immediately caused a flooding of the plaintiff's house by the very water coming from the defendant's house, the plaintiff brought his action, and it was held there that the plaintiff was entitled to maintain his action, and that upon the original conveyance to the defendant there was a reservation to the grantor of the right to carry away this water which came from the defendant's premises by the medium of the drain which also went through his premises. Though those circumstances were special in their character, there is no doubt that the principles laid down by the Court of Exchequer were as wide as possibly could be. That court laid down that there was no distinction between implied reservation and implied grant; and this, as it appears to me, broke the hitherto unbroken current of authority upon this subject.

Now, although it is possible that the actual decision in *Pyer* v. *Carter* was not exactly overruled, the principles there laid down were clearly and distinctly overruled by the same court in *White* v. *Bass*, 7 H. & N. 722; the facts of which case were these: A man was the owner of certain land and of a certain house which had windows through which the light, not as an easement but as a matter of enjoyment, had come for some time. He let the land (reserving the house)

to trustees, subject to certain covenants by which they were to build in a particular manner upon the land, and if those covenants had been complied with, and they had built in the specific manner, there would have been no obstruction to the lights of the house which the grantor or the lessor reserved. Therefore, if we were entitled in these cases to go back to matters which existed before the time of the conveyance, we should have found here, as clearly as could be shown, an intimation on the part of the lessor that if building was to be permitted on the adjoining land, it was only to be permitted under such conditions as would prevent the lights of the house being obstructed. But that being originally the position of matters it was followed by a conveyance of the reversion in the land to the trustees, and subsequently to that conveyance the house was conveyed to another person, and buildings having been put upon the land occupied by the trustees contrary to the terms of the original covenant, and of such a kind as obstructed the lights of the house, an action was brought by the person to whom the house was conveyed. In that action it was decided that the defendant held his land unfettered by the original covenant, and unfettered by any implied reservation, and that he was entitled to build in such a way as he thought proper on his land, although the effect of what he did might be to obstruct the lights of the plaintiff. In giving judgment Lord Chief Baron Pollock says this (7 H. & N. 730): "My Brother Petersdorff has cited no authority for the precise matter which he has urged before us, and I think that in construing a conveyance of land we must collect what the parties intended from the language they have used. It seems to me that we cannot look into the lease of the 2d of October, 1855, for it is merged in the fee, a conveyance of the reversion having been made to the lessees, and we must look to that conveyance alone in order to ascertain the rights of the parties. In that conveyance there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the plaintiff's house, nor indeed any limitation of the right to use the land." Now, no case can be more clear and distinct upon the point which we have to decide to-day, and the case is admitted by Sir Henry Jackson to be such: but he suggested that we ought to overrule it as being an exception to the general current of authority. So far from that being the case, *Pyer* v. *Carter* appears to me to have been the exception, and not *White* v. *Bass*.

The latter case was followed by *Suffield* v. *Brown*, 4 D. J. & S. 185. A good deal has been said about that case; and the principles upon which this court ought to act in dealing with decisions of courts of co-ordinate authority have been also discussed. I think I may say for myself (and I believe I am expressing the views of the other members of the court) that we ought not to lay down as an absolute rule that decisions of Lord Chancellors, at all events sitting alone, are to be taken as decisions of the Court of Appeal, and absolutely binding on this court so as to prevent us from even looking into the grounds or

considering the case which was before the particular Lord Chancellor. But no doubt the greatest weight ought to be given to such decisions, and unless they are shown to be manifestly wrong or manifestly contrary to the general current of authority on the point decided, it appears to me that we ought not to take upon ourselves to overrule them.

That being so, let us look a little more narrowly into that case. First, we have to see what was decided — and by that I do not mean what was absolutely necessary to be decided, but what really the Lord Chancellor took upon himself to decide, and, although he might have decided the case upon other grounds, put as his *ratio decidendi*. Upon that point there can be no doubt. We have only to read the close of his judgment to see that he put it entirely upon this principle, which I have stated as the second of the general rules applicable to cases of this kind, that a man cannot derogate from his own grant, and that as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee. The Lord Chancellor closes his judgment by saying (having dealt with some of the authorities as to continuous and apparent easements): "But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made." Although, therefore, it is perfectly true that, looking to the special circumstances of that case, it might have been decided upon those special circumstances so as even to admit the proposition for which Sir Henry Jackson contends, it is equally clear that the Lord Chancellor did not so decide the case, but decided it upon a distinct negative of that proposition. If we were to stop here, it seems to me that, looking to the fact that this was not a case in which this point in question was mooted for the first time, but that the point had been mooted and decided as early as the third year of the reign of Queen Anne, we should not be justified in doing anything but follow the principles enunciated by Lord Westbury.

But *Suffield* v. *Brown* has been confirmed by an equally high authority, for in *Crossley & Sons* v. *Lightowler*, Law Rep. 2 Ch. 478, Lord Chelmsford as Lord Chancellor had to deal with a similar question, and he there says: "Lord Westbury, however, in the case of *Suffield* v. *Brown*, refused to accept the case of *Pyer* v. *Carter* as an authority, and said, 'It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation.' I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make, in

every case of this kind, an implied reservation by law; and yet the law will not reserve anything out of a grant in favor of a grantor except in case of necessity."

Now the only case in the Court of Appeal which is suggested as being contrary to this high authority of two Lord Chancellors, is *Watts* v. *Kelson*, Law Rep. 6 Ch. 166, 174; and no doubt there are observations of Lord Justice Mellish to the effect that the order of conveyance in point of date is immaterial, that *Pyer* v. *Carter* is good sense and good law, and that most of the common law judges have not approved of Lord Westbury's observations. But, putting aside for the moment that this was a mere *dictum* of the Lord Justice during the argument, I must observe that this is not exactly so, as in *White* v. *Bass* the judges of the Court of Exchequer had distinctly, as regards the reasoning of *Pyer* v. *Carter*, overruled that case. No doubt, also, Lord Justice James says, "I am satisfied with the decision in *Pyer* v. *Carter*." But in the considered judgment of the court, when if it had been intended to say that *Suffield* v. *Brown* was not law, one would have thought there would have been something distinct upon the point, there is not one word to the effect of that which had been said by the Lords Justices during the argument. All that is said about it is this. Lord Justice Mellish, who delivered the judgment, after referring to *Nicholas* v. *Chamberlain*, said, "This case has always been cited with approval, and is identical not only in principle but in its actual facts with the case now before us. It was expressly approved of by Lord Westbury in *Suffield* v. *Brown*, where, though he objected to the decision in *Pyer* v. *Carter*, in which it was held that a right to an existent continuous apparent easement was impliedly reserved in the conveyance by the owner of two houses in the alleged servient houses, yet he seems to agree that the right to such an easement would pass by implied grant where the dominant tenement is conveyed first:" and that is what the Court of Appeal had to decide in *Watts* v. *Kelson*, Law Rep. 6 Ch. 166. Therefore *Watts* v. *Kelson* is no authority to justify us in overruling *Suffield* v. *Brown*, still less for overruling it supported as it is by the case of *Crossley & Sons* v. *Lightowler*. Thus, then, as it appears to me, stand the principal authorities on the general rules of law which I stated at the commencement of this judgment.

Other cases which have been cited during the argument illustrate the exceptions to the second of those general rules. As I have already said, there is an undoubted exception in cases where the easement is what is called a way of necessity. Thus in *Pinnington* v. *Galland*, 9 Ex. 1, 12, which was a case for disturbance of a right of way, there were five closes, two of them called the Holme Closes, which were separated by the others from the only available highway, and which were conveyed subsequently in point of time to the conveyance of the remaining closes through which this way *de facto* ran. In deciding that the way still existed, Baron Martin appears to me to have put the case entirely upon the exception to which I am referring. He says this:

"Secondly, assume that the conveyance to Mr. Dearle was executed the first. In this case the Rye Holme Closes were for a short period of time the property of Mr. Dickinson after the property in the land conveyed to Mr. Dearle had passed out of him. There is no doubt apparently a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority the law is the same, for the note 1 Wms. Saund. 323, n., proceeds thus: 'So it is when he grants the land and reserves the close to himself;' and he cites several authorities which fully bear him out: *Clark* v. *Cigge*, Cro. Jac. 170; *Staple* v. *Haydon*, 6 Mod. 1; *Chichester* v. *Lethbridge*, Willes, 72, n. It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant, but the law is distinctly laid down to be so, and probably for the reason given in *Dutton* v. *Taylor*, Lutw. 1487, that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." Now those last words clearly show that the whole foundation of the judgment in the case of *Pinnington* v. *Galland* was that the way claimed in the case was a way of necessity, and it is equally clear, as it seems to me, that Baron Martin and the court whose judgment he delivered in no way disputed the general maxims to which I have referred. The case of *Davies* v. *Sear*, Law Rep. 7 Eq. 427, 431, also appears to me to have been decided on the same basis. There a man, a builder, had got a lease of land for the purpose of building upon that land, and he proposed to build upon it in such a way as that through an archway, which was, at all events, standing to such an extent as to show that it was intended to be used for a passage — that through that archway should be the only means of communication with certain stables which were to be erected. That being the position of things, a portion of the land was sold to a third person, and the question arose whether it was open to that person to build upon his land in such a way as to obstruct this one only way into the stable. The Master of the Rolls (Lord Romilly) held that it was not. And why? He founded his opinion upon the basis of this exception to which I am referring. He says: "The question is, whether the defendant has a right to shut up the archway, and to intercept all access to Erskine Mews through this passage. This depends upon whether this easement is reserved by implication on the assignment of the house to the defendant; and this depends upon whether the easement is apparent, and also is a way of necessity."

These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favor of the grantor of land.

Upon the question whether there is any other exception, I must refer both to *Pyer* v. *Carter* and to *Richards* v. *Rose*, 9 Ex. 218; and, although it is quite unnecessary for us to decide the point, it seems to me that there is a possible way in which these cases can be supported without in any way departing from the general maxims upon which we base our judgment in this case. I have already pointed to the special circumstances in *Pyer* v. *Carter*, and I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer* v. *Carter* is right or wrong comes for discussion, to consider that point. *Richards* v. *Rose*, although not identically open to exactly the same reasoning as would apply to *Pyer* v. *Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other. Is there anything unreasonable — is there not, on the contrary, something very reasonable — to suppose in that case that the man who takes a grant of the house first and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own?

One other point remains, and that I shall dispose of in a very few words. It is said that, even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swansborough* v. *Coventry*, 9 Bing. 305, and *Compton* v. *Richards*, 1 Price, 27; namely, that although the land and houses were not in fact conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction. It seems to me that that proposition cannot be supported for one moment. We start here with an absolute conveyance in January, 1876. What right have we to look back to any previous contract or to any previous arrangement between the parties? If it had been the case of an ordinary contract, and there had been parol negotiations, it is well established law that you cannot look to those parol negotiations in order to put any construction upon the document which the parties entered into for the purpose of avoiding any dispute as to what might be their intentions in the bargain made between them. The same rule of law applies, and even more strongly in the case of a conveyance, which alone must regulate the rights of the parties. In the cases which have been cited the conveyances were founded upon transactions which in equity were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same

moment of time and as part and parcel of one transaction. There may be, and there is, according to *Swansborough* v. *Coventry*, another exception to the rule which I have mentioned; but here the sale by auction was abortive as regards the defendant's property. There was a conveyance in January of the plaintiff's property without any reservation, and there was no contract of purchase on the part of the defendant until more than a month after that conveyance had been complete. I believe I am expressing the view of the other members of the court when I say that it appears to the court that under such circumstances there is no exception to the general rule. For these reasons, therefore, the appeal should be dismissed.

James, L. J. The Lord Justice has been kind enough to express the judgment of the court. I only want to say something in addition, that in the case of *Nicholas* v. *Chamberlain* the court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house. The appeal is dismissed, with costs.

Baggallay, L.J., concurred.

Horton Smith, Q. C., and *Romer*, for the plaintiff.

Sir H. Jackson, Q. C., and *Colt*, for the appellant.[1]

KENT *v.* WAITE.

Supreme Judicial Court of Massachusetts. 1830.

[*Reported* 10 *Pick.* 138.]

Case for obstructing a way leading from a wood-lot belonging to the plaintiff, over the defendant's pasture, to Flip Lane in Leicester. The three first counts in the declaration described the way as appurtenant to the wood-lot; the fourth and fifth alleged a prescriptive right to the way in the plaintiff and all those who were owners of the farm on which he lived.

At the trial before *Parker*, C. J., it appeared, that on April 20, 1777, one Sylvester, who originally was the owner of both the wood-lot and the pasture, conveyed the pasture to Livermore and Jackson, "reserving to himself and to his heirs and assigns a drift-way across the above

[1] Where both lots are sold at the same time, the purchaser of the vacant lot cannot build so as to shut up the windows of the house. *Swansborough* v. *Coventry*, 2 Bing. 305; *Allen* v. *Taylor*, 16 Ch. D. 355. See *Russell* v. *Watts*, 25 Ch. Div. 559; 10 App. Cas. 590.

sold land." After several intermediate conveyances, with the same reservation to Sylvester, the land was granted to the defendant without any express reservation.

On July 1, 1779, Sylvester conveyed one half of the wood-lot to one Stone with all the privileges and appurtenances belonging to it. On August 3, 1793, Sylvester conveyed the other half of the wood-lot to one Thacher, together with the right of way which he had reserved in the deed to Livermore and Jackson. By several conveyances this same half passed to Stone, but in none of these deeds is any mention made of the right of way; nor is there any grant of the privileges and appurtenances. Stone, who had thus become the owner of the whole of the wood-lot, on March 6, 1807, conveyed it to Earle, with all the privileges and appurtenances. In 1811, Earle's administrator conveyed it to Denny, without any notice of the right of way, and after an intermediate conveyance it was conveyed to the plaintiff, in 1812, with all the privileges and appurtenances.

The defendant contended that the original right of way, as reserved by Sylvester, was extinguished, because in some of the conveyances of the wood-lot there was no mention of the right of way and no grant of privileges and appurtenances.

It was proved that the plaintiff had, ever since the purchase of the wood-lot, used this way for the purpose of carting wood to the village for sale, and for other purposes, and that Stone, his grantor, had used it in the same way. The way had been kept in repair by the plaintiff, the neighbors who used it assisting. No objection to the use of the way by the owners of the wood-lot, was ever made by the owners of the pasture, before the pasture was purchased by the defendant, which was in 1823.

In regard to the prescriptive title, it was proved that the plaintiff's ancestors, owners of the farm which he now owned, to which the wood-lot adjoins, used the way for passing and repassing on foot, with horses, teams, &c., for more than fifty years past and up to sixty; but it also appeared, that it was passed in the same manner by any other persons who had occasion to go that way. It also appeared, that the plaintiff might pass from the wood-lot through his own farm, to the place where the way in question comes out in Flip Lane, but by a circuitous route, the difference in distance being a mile and a half.

The defendant contended that the use of the way, as proved, did not support the counts on a right of way by prescription, and that on none of the counts could the plaintiff recover.

The facts above stated being clearly proved, it was agreed that a nonsuit or default should be entered, according as the court should determine the law of the case.

Norton and *Flint*, for the plaintiff.

Washburn, for the defendant.

WILDE, J., delivered the opinion of the court. The plaintiff relies on two titles to the right of way claimed in the writ, the one by grant, the

other by prescription; either of which, as appearing in evidence, is sufficient to maintain the action.

In 1777, one Peter Sylvester was the owner of the lot of land on which the right of way is claimed; and also of the wood-lot now owned by the plaintiff. In the deed of Sylvester to Livermore and Jackson, under which the defendant claims by divers mesne conveyances, there is a reservation made of a right of way across the land granted to the wood-lot, in favor of Sylvester, his heirs and assigns. The right of way is thus made appurtenant to the wood-lot, and has been so claimed and used by the tenants thereof ever since.

It is admitted that the plaintiff has a valid title to the wood-lot, but it is denied that he has any title to the right of way; because in some of his title deeds there is no express grant of the right of way, nor of the appurtenances of the wood-lot. But this omission is not material, for the principle seems to be well settled, that a right of way, or other easement, appurtenant to land, will pass by a grant of the land, without any mention being made of the easement or the appurtenances. This principle is laid down by Lord Coke, and is supported by a strong current of authorities. There is a *dictum* to the contrary in the case of *Higgins* v. *Grant*, Cro Eliz. 18, but it is wholly unsupported.

It has been argued, that a right of way will not pass as incident to a grant, unless the way is strictly necessary for the enjoyment of the thing granted. This is true in regard to ways of necessity. But the right of way claimed by the plaintiff has no such origin, and the cases cited in support of this position are not applicable. The plaintiff's right is derived from an express reservation; the easement reserved was made for the accommodation of the wood-lot, and thus became appurtenant to it; and as it belonged to this lot, so it passed with it without being named. This title, therefore, is well maintained, and fully supports the three first counts.

The two last counts were founded on a prescriptive title, and that also is well maintained by the evidence. It was proved that the plaintiff and his ancestors, owners of the farm adjoining the wood-lot, had used and enjoyed, without interruption, a way over the defendant's lot, for upwards of forty years; a sufficient length of time to establish a title by prescription. [as was again decided in the case of *Melvin* v. *Whiting*, in Middlesex, October Term 1830.]

It has been argued, that the evidence proved a custom, and not a prescriptive right; but we think it proved both a prescriptive title in the plaintiff, and a right by custom in others; and their rights are not inconsistent. Different persons may have a right of way over the same place by different titles, one by grant, another by prescription, and a third by custom; and each must plead his own title, and if he proves it, it is sufficient, although he may also prove a title in another, provided the titles are distinct and not inconsistent. There seems, therefore, to be no valid objection to either of these titles, and the defendant, according to agreement, is to be defaulted.

NICHOLS *v.* LUCE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1834.

[*Reported* 24 *Pick.* 102.]

TRESPASS *quare clausum fregit*. The defendants pleaded a right of way by necessity. Trial before *Wilde*, J.

The defendants derived their title from Seth Janes; who claimed under a deed from Daniel Weller to Janes, of forty acres of land, being parcel of lot No. 54, containing two hundred acres, situate in Pittsfield. Weller, at the time of the conveyance, owned the whole lot. The parcel conveyed to Janes was entirely enclosed by land of Weller and others, and was not open to any public road. The plaintiff was the owner of a portion of lot No. 54, situate north of the defendants' land, and derived his title from Weller, by a deed subsequent to the conveyance to Janes. The plaintiff's land was situate between a public road north of it, and the defendants' land. The defendants' land is woodland, and the trespass was the carrying wood across the plaintiff's pasture.

The plaintiff introduced evidence to show, that at the time of the conveyance from Weller to Janes, Weller was the owner of a small parcel of land, of about two acres, contiguous to the forty acres on the east, and bounded on the east by a road: and then contended, that as the defendants might have a right of way *easterly*, across Weller's two acres, to a road, it was open to the plaintiff to show that the greater part of the forty acres was more easily accessible from the east road than from the north road through the plaintiff's land: and the plaintiff produced evidence to establish that fact.

The defendants offered to prove that a certain portion of their forty acres, viz. about four acres, was separated from the residue by a rise of land, so as to render it exceedingly difficult to pass from it across southerly to the east road, but that in using the four acres it would be much more convenient to the defendants to pass north, over the plaintiff's land, to a road.

Upon this the judge ruled, that if the defendants' whole lot, taken together, could be more conveniently used, by the road passing easterly over the two acres of Weller, it was no defence to the action, that the defendants could show that the parcel of four acres on the north part of their lot was situate as alleged by them, and that a northerly road over the plaintiff's land was required for the use of that parcel.

This opinion having been expressed, the defendants consented to be defaulted, and to have judgment entered for $2 damages: unless the whole court should be of opinion, that the evidence offered by the defendants was material and ought to have been admitted: in which case a new trial was to be had.

C. A. Dewey and *Lanckton*, for the defendants.

Bishop and *Gould*, for the plaintiff.

Morton, J., delivered the opinion of the court. The defendants claim a way of necessity, across the *locus in quo*. The three different modes of acquiring and holding rights of way, in their origin resolve themselves into one. The distinction between them relates more to the mode *of* proof than to the source of the title. They are all derived from the voluntary grant of the proprietor of the fee. *Prescription* presupposes, and is evidence of a previous grant. *Necessity* is only a circumstance resorted to for the purpose of showing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much *creates* the way of *necessity* as it does the way by *grant*. The only difference between the two is, that one is granted in *express words* and the other only by *implication*. *Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest*. Thus when a man grants a close inaccessible except over his own land, he impliedly grants a right of passing over that land. Otherwise the grantee could derive no benefit from the grant. The same rule of construction would govern a reservation out of lands granted. Co. Lit. 56 a; *Liford's Case*, 11 Coke, 52; *Lord Darcy* v. *Askwith*, Hob. 234; *Clark* v. *Cogge*, Cro. Jac. 170; *Hooton* v. *Frearson*, 8 T. R. 56; *Morris* v. *Edgington*, 3 Taunt. 23; *Gayetty* v. *Bethune*, 14 Mass. R. 55. It is not the necessity which creates the right of way, but the fair construction of the acts of the parties. No necessity will justify an entry upon another's land. If a man can be supposed to hold land without any right of access to it, a grant of it would not convey to the grantee any right to pass over the adjoining land, however *necessary* it might be to the enjoyment of the thing granted. He would acquire nothing more than his grantor held. The estate would gain no accretion by passing from hand to hand. The necessities of the parties would add nothing to it. *Dutton* v. *Taylor*, 2 Lutw. 1487.

But the true principle is, that nothing will pass, as incident to the grant, except it be *necessary* to the enjoyment of the principal thing granted. Hence the grantee of a close surrounded by the grantor's land, is entitled only to a convenient way over the grantor's land, and will have no right to pass over it wherever he pleases. He may select a suitable route for his way, but in doing it he must regard the interest and convenience of the owner of the land, and when he has done it, he will be confined to the same way and may not change its course according to his wishes or caprice. *Russell* v. *Jackson*, 2 Pick. 574; *Jones* v. *Percival*, 5 Pick. 485.

Although generally a man can acquire, as incident to a grant, only one right of way to the same close, yet the same principle of necessity which raises the implication of one, may extend it to two or more. Where a man should grant a tract of land surrounded by his own, so divided into parts by an *impassable* mountain, river or other barrier, as that there could be no passing from one part to the other, he would

by necessary implication convey a right of way to each separate part, because without this some portion of the thing granted would be entirely useless to the grantee. But these implications of grants are looked upon with jealousy and construed with strictness. It is only the *necessity* of the case which will carry one way; and certainly the *necessity* must be not less strong to carry two.

It is not pretended that the bluff across the defendants' land is impassable; but only that it is "exceedingly difficult to pass it, and that it would be much more convenient to the defendants to pass" over the plaintiff's land. Here is no such *necessity* as will raise an implication of a grant of different ways from different parts of the defendants' lot. Convenience, even great convenience, is not sufficient. If the defendants, when they purchased, had desired a separate way for this small section of their lot, they should have stipulated for it and had it expressly inserted in their deed.

With reference to the whole of the defendants' lot, the proof offered was, that a different route was much more convenient and useful than the one in question, and this the defendants virtually conceded by consenting to be defaulted. That way, then, whether it had been adopted and established by previous use or not, must be deemed the defendants' rightful and only way to and from their lot.

Judgment on the default.[1]

[1] "The instruction on this subject was, 'that the deed under which the plaintiff claimed conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in the power of the grantor to convey; that it was not enough for the plaintiff to prove that the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her intestate's house, without unreasonable labor and expense; that unreasonable labor and expense means excessive and disproportionate to the value of the property purchased; and that it was a question for the jury, on all the evidence, whether such new way could be made without such unreasonable labor and expense.'

"The court are of opinion that this instruction was correct. The word 'necessary' cannot reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land, if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of one hundred thousand dollars. If the word 'necessary' is to have a more liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was, to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling-house granted. See *Ewart* v. *Cochrane*, 7 Jur. N. S. 925; *Leonard* v. *Leonard*, 2 Allen, 543; *Cowley* v. *Wilkins*, 7 Allen, 364.

"As the facts were properly submitted to the jury, and evidence was admissible as to the consideration paid for the land and the cost of making a way, it was proper that the jury should compare the facts together and make such inferences as they should think reasonable. The instruction on this point was correct." — *Pettingill* v. *Porter*, 8 Allen, 1, 6, 7.

JOHNSON *v.* JORDAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported* 2 *Met.* 234.]

TRESPASS for breaking and entering the plaintiff's close, subverting his soil, &c. The parties agreed the following facts: —

The plaintiff and defendant, at the time of the alleged trespass, severally owned in fee a messuage and land, adjoining each to the other, and fronting on Temple Street in Boston. In 1804, both said messuages and lands were owned by William Breed, who occupied one of them himself, and laid an artificial drain or conduit through the same into Ridgway's Lane; which drain was used by said Breed, and also, by his permission, by the tenants to whom he leased the other messuage, for the purpose of leading off waste water from the buildings on his said lands, into a common sewer of the city, situated in said lane. Said Breed died seised of said messuages, &c., in 1817, having devised the use thereof to his wife for life, and the remainder to Peter O. Thacher in fee. After said Breed's decease, his widow took possession of said messuages, &c., and held the same, occupying one of them, and leasing the other, until her death, April 10th, 1825, when said Thacher took possession thereof, and continued seised until the 13th of May, 1825, on which day he divided the same into several lots; the messuage of the defendant, in which a portion of the drain aforesaid was situated, being one, and the messuage of the plaintiff, in which another portion of said drain was situated, being the other; and on said day sold each of said lots at public auction. The messuage of the defendant was purchased, at said sale, by Enoch Kendall, and the messuage of the plaintiff by John P. Thorndike, as appears by said Thacher's deeds conveying the same, which are to be taken as part of this case. In November, 1825, said Thorndike conveyed his messuage to the plaintiff, and in July, 1826, said Kendall's executor conveyed his said messuage to the defendant.

After the said conveyances by Thacher, the waste water from the defendant's messuage ran in said drain through the plaintiff's land, into the common sewer, until May 1st, 1835. On that day, the plaintiff intentionally stopped up that part of the drain leading from the defendant's messuage, which was on the plaintiff's land; and in June following, as alleged in the plaintiff's declaration, the defendant entered on the plaintiff's land and opened the drain and removed the obstruction, doing no damage except such as was necessary to accomplish said act, and then closed the drain and restored the soil to its former condition.

The parties also agreed that any further evidence, legally admissible, might be introduced by either party, and that the jury should

find, under the direction of the court, whether the defendant was or was not guilty, and if guilty, assess damages; and that either party might except to the ruling of the judge before whom the case should be tried, upon the foregoing facts agreed, and upon the further evidence that should be introduced.

The deed from Thacher to Kendall was of a lot of land, without mention of the drain, or of privileges and appurtenances. It was stated in said deed that Thorndike had the right to have a gutter on the side of the stable adjoining the lot conveyed to Kendall; and the deed was on condition that Kendall and his assigns should never open any windows or light on the side of any building that might be erected on the premises next to the mansion house sold to Thorndike.

At the trial before *Wilde*, J., the foregoing statement of facts, with the papers therein referred to, were submitted to the court and jury. The defendant was also permitted to introduce evidence to prove that at the time of the aforesaid deeds of conveyance, made by Thacher, no drain could be made, with reasonable labor and expense, to carry off the waste water from the sink in the defendant's messuage, in any other direction than through said land of the plaintiff, and therefore that said drain was a drain of necessity.

The plaintiff was then permitted to introduce evidence to prove, that at the time aforesaid, and ever since, a drain could conveniently have been made, with reasonable labor and expense, from said sink, without going through the plaintiff's land as aforesaid.

The judge instructed the jury, that upon the facts agreed, if they were satisfied, from the other evidence introduced by the parties, that with reasonable labor and expense, a drain could be conveniently made, without going through the plaintiff's land, they should return a verdict for the plaintiff. To this instruction the defendant excepted.

A verdict was returned for the plaintiff. Judgment to be rendered thereon, if the instruction of the judge was correct; otherwise, the verdict to be set aside, and a new trial granted.

This case was argued at March Term, 1840.

B. R. Curtis, for the defendant.

Blair and *E. D. Sohier*, for the plaintiff.

SHAW, C. J. In an action of trespass *quare clausum fregit*, the defendant justifies under a claim of right to enter, and open and cleanse a drain, running from his own house into and through the defendant's premises, to a sewer in Ridgway's Lane. If he has such a right, it is a good justification; it being admitted that he entered for that purpose, and did no damage beyond what was necessary to accomplish it. But the plaintiff contends that the defendant had no right to continue the drain through his premises; and this is the question for the consideration of the court.

It is very clear that whilst both estates were held by the same owner, he had a right to carry his drain as he pleased, through any part of his own grounds; and so long as both tenements were owned

and occupied by the same person, no easement was created, or began to be created, in favor of one, and operating as a service or burden upon the other. So long, therefore, as such unity of title and of possession subsists, no right of easement is annexed to one tenement or charged on another; and it is quite immaterial how long the drain has subsisted during such ownership.

If such an owner will convey one of the tenements and retain the other, he may grant the right of drain, or not, to pass with the estate conveyed, or may reserve such a right over the estate conveyed, for the benefit of the one retained, as he pleases. It is matter of contract, and must depend entirely upon the construction of the conveyance. Supposing this to be clear, the question recurs, What construction will the law put upon a conveyance, where the intention of the parties in this respect is not expressed in terms?

In the first place, it is proper to distinguish an artificial gutter of this description, made for the purpose of draining, from a natural watercourse, the rights of parties to which depend upon a different principle. Every person, through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land, on the same watercourse, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it; and disuse cannot destroy or suspend it. Unity of possession and title in such land with the lands above it or below it does not extinguish or suspend it.

This case is also to be entirely distinguished from one wherein the declivity of the land and the relative position of the tenements are such, that a drain cannot be formed for the benefit of one, without passing through the other. Such a case might stand upon a different ground. But in the present case, it was found by the jury, that a drain could be conveniently made, with reasonable labor and expense, from the defendant's house, without going through the plaintiff's land.

There are some general and well settled rules of construction of conveyances, which tend in some degree to settle the question. The language of the deed is the language of the grantor; he selects the terms, and it being supposed that he will insert all that has been agreed upon beneficial to himself, and will be less careful to state fully all which is beneficial to the grantee, the language is to be construed most strongly against the grantor.

Another well-settled rule of construction is, that a grant of any principal thing shall be taken to carry with it all which is necessary to the beneficial enjoyment of the thing granted, and which it is in the power of the grantor to convey. When therefore a party has erected a mill on his own land, and cut an artificial canal for a raceway, through his

own land, and then sells the mill, without the land through which such artificial raceway passes, the right to use such raceway through the grantor's land shall pass as a privilege annexed *de facto* to the mill, and necessary to its beneficial use. *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190.

Under these rules, it might perhaps be held, that if a man, owning two tenements, has built a house on one, and annexed thereto a drain, passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee: Whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms, when it naturally would be, if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance. *Leonard* v. *White*, 7 Mass. 8; *Grant* v. *Chase*, 17 Mass. 443.

But neither of these rules will apply to the present case, because it appears by the deeds themselves, as well as by the other evidence in the case, that the two conveyances from the owner of the whole, under which the parties claim, were simultaneous. It is therefore much more like a partition between tenants in common, where each party takes his estate with the rights, privileges, and incidents inherently attached to it, than like the case of grantor and grantee, where the grantor conveys a part of his land, by metes and bounds, and retains another part to his own use, and where the question is, upon the terms of the deed, whether an easement for drainage has been granted with the estate conveyed over that retained, or reserved over that conveyed, for the benefit of that retained.

In the present case, the estates were both owned and occupied by Mr. Thacher until the sale made to Mr. Thorndike and Mr. Kendall, under whom the plaintiff and defendant respectively derive title. Both of these deeds bear date the same day. Each refers to the estate described, as this day sold to the other. Both deeds must be taken and construed together. In the deed to Thorndike, an easement for a gutter was created; and in the deed to Kendall, the same is charged as a perpetual servitude, in favor of Thorndike and his heirs. The conveyance to Kendall was made upon an onerous condition never to open windows in any building to be erected on the premises, on the side next to the dwelling-house conveyed to Thorndike; a condition manifestly designed for the benefit of the estate conveyed to the latter; and in the deed to Thorndike, this restriction upon the estate conveyed to Kendall is recited; intended, no doubt, to show that the estate to Thorndike and his assigns, was thereby enhanced in value. The well-known maxim of construction, and a very sound one, is, *Expressio*

unius exclusio est alterius. Here was a division of these two tenements intimately connected with each other, with detailed provisions in respect of the rights which each should have in the other, and the duties to which each should be subject in favor of the other. If it was intended that one should have a perpetual right of drainage through the other, with a right of entry at all times to repair and relay such drain, especially where it is found not to be necessary to the enjoyment of the estate granted, it seems reasonable to suppose that it would have been expressed. As no such right was expressed, we are of opinion that it was not intended to be granted; and as it was not necessary to the enjoyment of the estate, and had not been *de facto* annexed, so as to pass by general words as parcel of the estate, it did not pass to the defendant's grantor by force of the deed. As about ten years only elapsed after these conveyances, and the consequent division of the two tenements between different proprietors, before the grievance complained of, it is very clear that the defendant derived no right to the easement by actual use and enjoyment. Such a right in the estate of another can be created by actual use, only when such use has been adverse, peaceable, and uninterrupted, and continued for a period of twenty years.

Judgment on the verdict for the plaintiff.[1]

CURTIS *v.* GARDNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1847.

[*Reported* 13 *Met.* 457.]

WILDE, J.[2] At the trial of this cause, it was agreed by the parties that Elijah Clap 2d was the owner of a tract of land, including the demanded premises, and that, in August, 1815, he, with Peleg and Joseph Curtis, built the saw mill, described in the demandant's writ, on a dam crossing a stream within said tract of land. Afterwards, in 1831, said Clap conveyed the said tract of land, with one half of said saw mill, to Edward Curtis, reserving the other half by the following clause in the deed: "The said saw mill being in common and undivided with Peleg and Joseph Curtis (the owners of the other half), who have the privilege of using the same in equal shares with the said Edward until it shall run down, and taking water for that purpose when it is not wanted for the use of the grist mill."

Whatever might be the intention of the parties to this conveyance, it is very clear, that nothing was reserved in the land but an estate for life, during the lives of the said Peleg and Joseph Curtis, and the life

[1] See *Collier* v. *Pierce*, 7 Gray, 18, and cases cited in note to *Cowley* v. *Wilkins*, p. 575, *post*.

[2] The opinion only is given.

of the survivor; and as both have since deceased, the demandant's title, who claims under them, fails. It is true that only one half of the saw mill was conveyed to Edward Curtis, and the other half has been conveyed to the heirs of Peleg and Joseph Curtis, of whom the demandant is one. Whether they have a right to a half of the mill, considered as personal property, and, if they have, what remedy they may have against the tenant, if he should refuse to suffer them to occupy, are questions not to be decided in the present case. But as to the title to the land, the rule of law is inflexible. To create an estate of inheritance by deed, except by a deed to a corporation, and one or two other special exceptions not applicable to this case, the land must be conveyed to the grantee *and his heirs;* and no words of perpetuity will supply the omission of these necessary words of limitation. A grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life. Lit. § 1. 2 Crabb on Real Property, §§ 955, 956. *Wright* v. *Dowley*, 2 W. Bl. 1185. *Gould* v. *Lamb*, 11 Met. 86. And the same rule applies to words of reservation or exception. If the reservation had been to Clap and his heirs, for the use of Peleg and Joseph Curtis, until the mill should run down, that would have been the reservation of a determinable estate in fee; but the words "his heirs" are as essential in the reservation of such an estate, as in that of an absolute fee simple.

Nonsuit confirmed.[1]

P. Simmons, for the demandant.

J. H. Loud and *Clifford*, for the tenant.

THAYER *v.* PAYNE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[*Reported* 2 *Cush.* 327.]

THE plaintiff and defendant were the owners and occupants of adjoining lots of land, with the buildings thereon, in Randolph. A drain, for the use of the dwelling-house on the defendant's land, was constructed from the same, through the plaintiff's land, to a convenient outlet. The drain being out of repair, the defendant entered upon the plaintiff's land, and opened the drain for a short distance, and made such repairs upon it as were necessary. The plaintiff thereupon brought the present action, which was trespass, against the defendant, for such entry and repair of the drain.

The plaintiff acquired his title to the lot occupied by him by mesne conveyances from Isaac Washburn, who conveyed the same to Bradford L. Wales, July 1st, 1833, who conveyed to Jonathan Wales, September

[1] See *Jamaica Pond Co.* v. *Chandler*, 9 Allen, 159, 170.

1st, 1836, by whom the lot was conveyed to the plaintiff, December 18th, 1838.

The defendant became the owner of the lot occupied by him by a deed from the plaintiff, dated April 6th, 1843, made in pursuance of a bond therefor, bearing date May 30th, 1835. The plaintiff obtained his title to the same by a deed from Ephraim Wales to him and one French, dated November 14th, 1854.

On the trial, before *Mellen*, J., in the Court of Common Pleas, many other facts were in evidence; which, with the instructions of the presiding judge to the jury, are sufficiently stated in the opinion of the court.

J. J. Clarke and *A. Prescott*, for the plaintiff.

N. F. Safford and *N. C. Berry*, for the defendants.

Fletcher, J. This is an action of trespass, for breaking and entering the plaintiff's close, situated in Randolph. The defence is, that the defendant entered the *locus in quo* and opened a drain leading from his cellar through the plaintiff's close, as he lawfully might do. The *locus in quo* was conveyed to the plaintiff by Jonathan Wales, by a deed dated December 18th, 1838. The premises owned by the defendant, from which the drain leads, were conveyed to the plaintiff and Jacob W. French by Ephraim Wales, by a deed dated November 14th, 1854. At the time of this conveyance to the plaintiff and French of the premises now owned by the defendant, there was no drain leading from the house of the defendant through the *locus in quo* owned by the plaintiff. The drain was built after this conveyance; but at what particular time does not appear by the exceptions.

On the 30th of April, 1835, the plaintiff gave a bond to the defendant, with condition to convey to him the premises now owned by him, upon the payment of a specified sum of money at certain times as stipulated in the condition of the bond. The *locus in quo*, in which the trespass is alleged to have been committed, was conveyed to the plaintiff by Jonathan Wales, by a deed dated December 18th, 1838, some years subsequent to the time when the plaintiff gave his bond to the defendant, to convey to him the premises now owned by the defendant, and from which the drain leads.

The defendant having paid the money according to the condition of the bond made by the plaintiff to the defendant, the plaintiff, by a deed dated April 5th, 1843, conveyed to the defendant the premises mentioned in the bond, and from which the drain leads through the *locus in quo* owned by the plaintiff. There is no doubt that the drain existed at the time of the making of this deed. In this last-mentioned deed of the plaintiff to the defendant, the *habendum* is as follows: "To have and to hold the aforegranted premises, with the privileges and appurtenances thereto belonging at the time of the purchase thereof by the said Thayer and French."

On the part of the plaintiff it was maintained, that this clause in the deed expressly restricted the grant to such privileges and appurtenances

as existed at the time of the purchase by the plaintiff and French, and the drain not existing at that time, it could not be conveyed by the deed as appurtenant to the land granted. On the part of the defendant, it was maintained, that the drain from the defendant's cellar was necessary to the enjoyment of his estate, and that he had a right by grant and by necessity to the use of such drain, and that he had a right to enter upon the plaintiff's premises for the purpose of repairing the drain there situated, and that he entered as he lawfully might do for that purpose, doing no unnecessary damage. Evidence was introduced by the defendant, tending to show the necessity of a drain from the defendant's cellar.

The judge, who presided at the trial in the court below, instructed the jury as follows: "That in order to raise the presumption of a grant to dig and maintain this drain through the plaintiff's land in the manner claimed by the defendant, the drain in the place where the same was dug and repaired must be so necessary to the enjoyment of the estate owned by the defendant, that it could not be reasonably presumed, that the defendant would have purchased the said estate without at the same time purchasing the easement claimed in this case; that if they found the drain in question so necessary to the enjoyment of the estate of the defendant, they might presume a grant to the defendant of the easement claimed by him in this action; and if they found that the drain was necessary in the degree above mentioned, that the construction of the drain in the place where it was originally dug, by consent of the owners of the estates, might be regarded by them as a practical construction by the owners, that this was the most suitable place for the maintenance of such drain." To this ruling the plaintiff excepted, and the case comes before this court on the exceptions.

It does not appear to this court, that it was correct to submit the case to the jury, with the instruction, that they might presume a grant to the defendant of the easement claimed by him. The true question to be settled was, whether or not the deed made by the plaintiff to the defendant, April 5th, 1843, conveying the house and land now owned by the defendant, conveyed also the right to the drain through the premises of the plaintiff. If that deed conveyed this easement, then the defendant has a right to it; but the case discloses no ground upon which the defendant can claim this easement, except under and by virtue of that deed. There is surely nothing in the case to warrant a presumption of any other deed than that produced and read on the trial.

The rights of the parties, therefore, in reference to this drain, must depend upon the construction of the deed, from the plaintiff to the defendant, dated April 5th, 1843. The *habendum* of this deed is: "To have and to hold the aforegranted premises, with the privileges and appurtenances thereto belonging at the time of the purchase thereof by the said Thayer and French." For the plaintiff it is maintained, that, by reason of this particular expression, "the privileges

and appurtenances belonging to the granted premises at the time of the purchase thereof by said Thayer and French," no other privileges or appurtenances, but such as existed at the particular time referred to, passed by the deed; and, therefore, that as the drain did not exist at that time, no right in the drain was conveyed by the deed.

But it must be remarked, that there are no negative terms excluding other privileges and appurtenances than those existing at the particular time referred to, and no terms in any way restricting or limiting the legal effect and operation of the grant of the principal thing. What rights, therefore, the defendant acquired under and by virtue of the conveyance of the house and land to him by metes and bounds, must be determined by the general principles of law, as there is nothing in the deed to prevent or restrict the operation of these general principles.

Now, it is a well-settled principle, that privileges and appurtenances properly belonging to a thing granted pass with it, though not particularly named. Therefore, though the *habendum* in the deed to the defendant refers to the privileges and appurtenances existing at the time of the purchase by Thayer and French, yet, whatever privileges and appurtenances properly belonged to the granted premises, at the time of the grant, passed with the premises granted, though not particularly mentioned or described.

It is a rule in the construction of deeds, that the language, being the language of the grantor, is to be construed most strongly against him. It is also a settled principle of construction, that the grant of a particular defined piece or parcel of land carries with it whatever is necessary to the beneficial enjoyment of the thing granted, which it is in the power of the grantor to convey. Upon this principle, the conveyance by the plaintiff to the defendant, of the house and land particularly bounded and described in the deed of April 5, 1843, carried with it whatever was necessary to the beneficial enjoyment of the estate granted, which it was in the power of the plaintiff to convey. At the time of this grant, the plaintiff owned the *locus in quo* through which the drain then passed, and, of course, had the power to convey to the defendant the right to use the drain; and it follows, therefore, that if the use of the drain was necessary to the beneficial enjoyment of the premises granted, the right to the use of the drain passed by this conveyance. If the defendant had a right to the use of the drain, he has a good justification for the acts complained of, and this action cannot be maintained.

The question, therefore, to be settled, and which is a question for the jury under proper instructions from the court, is, whether or not the use of the drain, through the land of the plaintiff, was necessary for the beneficial enjoyment of the house and land granted by the plaintiff. The settlement of this question, will of course involve the inquiry, whether or not a drain could be conveniently made, with reasonable labor and expense, without going through the plaintiff's land.

Because, if the defendant can thus furnish his house with a drain, it cannot be necessary to the enjoyment of his estate, that he should have a drain through the land of the plaintiff. Upon another trial, the question, whether or not the defendant has a right to such a drain through the land between his house and the turnpike road mentioned in the deed of the plaintiff, may be raised and presented for the decision of the court, but it is not necessary, and perhaps not advisable or suitable, to consider that question at this time. Upon another trial, the facts in reference to that question may be more fully presented.

Exceptions sustained.[1]

BOWEN *v.* CONNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1850.

[*Reported* 6 *Cush.* 132.]

THIS was an action on the case for obstructing a right of way, claimed by the plaintiffs over a strip of land lying on the westerly side of land of the defendant on Pine Meadow Street, in Worcester, and extending from the same to land of the plaintiffs. The obstruction complained of was the maintaining and continuing of a house thereon.

The parties submitted the case upon the following statement of facts: —

On the 9th of March, 1849, the plaintiffs and the defendant were tenants in common of an estate on Pine Meadow Street, there measuring from 100 to 130 feet, and extending back from 300 to 400 feet; the plaintiffs, George Bowen and Horatio A. Tower, owning one half, and the defendant, Conner, the other half, undivided. A division was then made, and the defendant conveyed to the plaintiffs, by deed of quitclaim, all his interest in the northerly part of the estate, and the plaintiffs quitclaimed to the defendant the southerly, being the larger portion of the lot, with the following reservation: "Reserving forever a right of way over a street which the said Conner is to make from the northwest corner of said granted lot to Pine Meadow Road; said street to be thirty feet in width, adjoining the west line of the said granted lot." At the time of the division a dwelling-house extended over a part of the strip, thirty feet in width, over which the right of way was reserved.

The plaintiffs purchased the northerly part of the land, for the purpose of laying out the same, with other land adjoining thereto, into house-lots (though this fact was not mentioned in either of the deeds),

[1] See *Brakely* v. *Sharp*, 1 Stockt. 9; 2 Stockt. 206. In *Dolliff* v. *Boston & Maine R. R.*, 68 Me. 173; and *Stevens* v. *Orr*, 69 Me. 323, it was held that the easements claimed were not necessary to the beneficial use of the estate granted, and that therefore under the test laid down in the principal case they were not to be implied.

and the street over which the right of way was reserved was the only access to the lots so to be laid out. It also appeared, by reference to a plan, which was made a part of the case, that the whole of the lot divided was so surrounded by lands of other proprietors, that there was no access to any highway from the original lot, but upon the Pine Meadow road.

If the court should be of opinion, that the maintenance and continuance of the dwelling-house, from the date of the deed to the date of the writ, upon the strip of thirty feet, was an obstruction of the plaintiffs' right of way, judgment was to be entered for the plaintiffs, with damages fixed at the sum of ten dollars, otherwise the plaintiffs were to be nonsuit.

B. F. Thomas, for the plaintiffs.

P. C. Bacon and *H. D. Stone*, for the defendant.

SHAW, C. J. This is an action on the case for a nuisance occasioned by the obstruction of a private way, specially described as appurtenant to the land of the plaintiffs.

The question, and the only question argued, does not appear to be the question submitted to the court. The question reserved on the agreed statement of facts is, whether the building described, standing within the limits of the way claimed, was an obstruction. The only question argued was, whether by force and effect of the deeds referred to, and the rules of law applicable to them, the plaintiffs had the right of way which they claim.

The facts are, that the plaintiffs and the defendant were tenants in common of a small parcel of land in Worcester, bounding on one side, on a public highway called Pine Meadow Street, about 100 or 130 feet, and extending back 300 or 400 feet, the plaintiffs owning one moiety and the defendant the other. On the 9th of March, 1849, they made partition by deed. The parties did not join in one deed, but each made a deed to the other. These deeds, bearing the same dates, each reciting that the estate released is part of an estate then held by the parties in common, and each reciting the simultaneous conveyance of the other as a consideration, are to be taken as parts of one and the same transaction, and considered together for the purposes of construction. The plaintiffs took the rear part of the lot as their property, to hold in severalty, and the defendant the front part, probably allowing a larger quantity to the rear lot, as a balance to the greater value, by the superficial foot, of the front lot. In the deed of Bowen and Tower to Conner of the front lot, after the recital and granting part of the deed, is the following clause: "Reserving forever a right of way over a street, which said Conner (the grantee) is to make from the north-west corner of said granted lot to said Pine Meadow Road; said street to be thirty feet wide, adjoining the west line of said granted lot." The question is, whether this secured to the plaintiffs a right of way. As to the nature of that right, if one was well created, considering the circumstances, and construing the deeds together, we think it was a right

secured to the plaintiffs and their assigns, as owners of the rear lot, and therefore was a right of way annexed to the estate before owned in common, but then set off in severalty to the plaintiffs.

It is found in the statement of facts, that the rear land was intended to be used for house-lots; but as that fact is not mentioned in either of the deeds, and remained only in intention, we have placed no stress upon it. There is another consideration, however, of some importance; in referring to the plan, which is made a part of the case, we suppose that the entire land divided was surrounded by land owned by other private proprietors, and that there was no access to any highway from the original lot, but upon the Pine Meadow Road: if such be the case, it would seem that by established principles, the grantees of the interior lot would have had a way of necessity over the front lot, if there had been no specific reservation. This strengthens the conclusion, that it was the intention of both parties, that such a way should be established.

It was argued, that according to the English authorities, an easement, as a way, could not be created by a mere reservation. We have not thought it necessary to review the English authorities minutely on this subject; we know there is much nicety in the technical distinction between an exception and a reservation. Many of the cases in England have arisen upon the execution of powers of leasing, with certain precise reservations enumerated; and the question is, whether the lease made is within the power, which in all such cases is to be construed strictly. In our own conveyancing, this distinction is not so precisely observed, but a clause of reservation is construed to be an exception, if that will best effect the intent of the parties. And so in the English cases, the term reservation is often construed to be a good exception. But the distinction between an exception and a reservation is often very uncertain. Co. Lit. 47 a; Shep. Touch. 80; 4 Cruise (Greenl. ed.) 271, note 2; *Thompson* v. *Gregory*, 4 Johns. 81. But in a case like this, the right being established by a formal act, to which all the parties interested were parties and assenting, we consider it immaterial, whether the easement for the way intended to be established is technically considered as founded on an exception, a reservation, or an implied grant.

It seems by the authorities, that, had there been no express reservation in the present case, by necessary implication, the plaintiffs would have had a way as of necessity. But this, by the better authorities, is regarded as a way created by tacit reservation, or exception. *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321, note 6; *Clark* v. *Cogge*, Cro. Jac. 170; *Howton* v. *Frearson*, 8 T. R. 50; Bull. N. P. 74; 3 Kent (4th ed.) 424; 4 Ib. 468; 2 Cruise (Greenl. ed.) 28, 29; *Holmes* v. *Goring*, 2 Bing. 76. If a way would be established for the grantor, under such circumstances, on the ground, that the law will presume that the grantor intended to reserve or retain to himself a right of way over the land granted, for the use of the estate retained, *a fortiori* shall

the grantor be entitled to that right, when the intent is expressed by the grantor, and the grantee by accepting the deed with such a clause inserted assents to it.

Even if these two deeds were not to be construed together, as an indenture, there is abundant authority to show, that the grantee, by his acceptance of a deed-poll, becomes bound by all the restrictions, limitations, reservations, and exceptions contained in it. *Norcll* v. *Hill*, 2 Met. 180.

Upon principle, it appears to us, that this right, plainly intended by both parties to be secured to the plaintiffs, can legally be secured in the manner adopted in this deed, treating the right reserved as an exception. And according to a well known rule of law, extensively applicable to conveyancing, if a deed cannot operate in one legal mode, to effect the intention of the parties, it shall operate in another to accomplish that purpose, if it can be done without violating any principle of law.

Prior to these deeds, the plaintiffs, as tenants in common, had a right to pass over every part of this land at their pleasure. And each tenant in common had this entire right, although he had not the entire fee. When, therefore, the grantors conveyed the front lot, they restricted themselves from any further right to pass over the whole and every part, and limited themselves to the strip thirty feet wide, specially described. This was a part of the right previously enjoyed, and this they excepted out of the grant. Had it been reserved by implication, as a way of necessity which would have been general and undefined, it would have been competent for the parties, by a deed like the present, to limit and define the right to the specific thirty feet, and such an agreement would be binding.

But were the case less clear upon principle, and upon the authorities, the court are of opinion, that the law is settled in Massachusetts, by a series of decisions, that a right of way may be as well created by a reservation or exception, in the deed of the grantor, reserving or retaining to himself and his heirs a right of way, either in gross, or as annexed to lands owned by him, so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way, either in gross or as appurtenant to other estate of the grantee.

The rule has been rather assumed and taken for granted, than discussed and formally decided; but it has been judicially stated, adopted, and acted upon as settled law, in repeated instances, of which it will be necessary to cite a few only. *White* v. *Crawford*, 10 Mass. 183; *Atkins* v. *Bordman*, 20 Pick. 291; *Atkins* v. *Bordman*, 2 Met. 457; *Norcll* v. *Hill*, 2 Met. 180; *Mendell* v. *Delano*, 7 Met. 176. The last case was stronger than the present; a right of way was reserved in a deed-poll, made by a tenant in common, charging the estate conveyed with a servitude, being a right of way, in favor of his separate contiguous estate; and it was held to be an easement annexed to the

latter, and binding upon parties and privies claiming under the deed by which the right of way was reserved.

The court are, therefore, of opinion, that the plaintiffs had the right of way alleged to be disturbed by the defendant; and on the facts agreed, judgment must be entered for the plaintiffs, for the amount of damages agreed upon.

BORST *v.* EMPIE.

COURT OF APPEALS OF NEW YORK. 1851.

[*Reported* 1 *Sel.* 33.]

BORST, claiming to be entitled by grant to the exclusive right to use the water of a well, situated on the lands of the defendant, and to conduct the water in a line of pump-logs laid in the ground, through the lands of the defendant to the lands of the plaintiff, and to have the water flow through such logs and issue on the lands of the plaintiff, for all purposes and uses to which the plaintiff saw fit to apply the same; commenced an action on the case in the Supreme Court, against the defendant, charging him with using the water, and obstructing its flow upon the lands of the plaintiff. The defendant pleaded the general issue, and the cause was tried at the Schoharie Circuit in October, 1845, before the Hon. *Amasa J. Parker*, circuit judge.

On the trial, the plaintiff gave in evidence a deed from Jacob Crounse and wife, to Peter Empie, dated May 12, 1830, conveying fifty-one acres of land with its appurtenances, and containing the following reservation: "The said parties of the first part, do hereby reserve to themselves, and to their heirs and assigns one acre and a half of land, out of the above described premises, at the south-east corner of lot No. 11, and on which the tannery is erected, and running northwardly with the highway, so as not to exceed twenty-four rods in the rear; and that the said parties of the first part as aforesaid, do also reserve to themselves and their use, a certain well and water-works laid down for the purpose of supplying the tannery aforesaid with water."

Also a deed from Peter Empie to Peter Empie, junior (the defendant), dated May 8, 1843, conveying the same lands with a similar reservation.

The plaintiff also offered in evidence a deed from Jacob Crounse and wife, to Christopher Crounse, dated March 2, 1837, conveying the one and a half acres of land with its appurtenances, upon which the tannery was situated, and which was reserved in the deeds before mentioned.

The execution of this deed appeared to have been witnessed by Hezekiah Sharp, and there was a certificate of acknowledgment of the execution of the deed by the grantors indorsed upon it, and signed by the said Sharp, as a commissioner of deeds of the County of Albany. A witness called by the plaintiff proved the signature of Sharp as a

subscribing witness, and that he was dead. Also that he formerly resided in Guilderland, Albany County, and was reputed to be a commissioner of deeds of that county.

The defendant's counsel objected to the proof of the handwriting of the subscribing witness, on the ground of the acknowledgment of the deed before Sharp; insisting that such acknowledgment, with a certificate of the clerk of Albany County, that Sharp was a commissioner of deeds, was the best evidence, and that the plaintiff was bound to produce it. The court overruled the objection and the deed was read. The defendant's counsel excepted.

The plaintiff proved a conveyance to him from Christopher Crounse, dated March 11, 1843.

The obstruction and use of the water by the defendant, as alleged in the declaration, were admitted by the defendant.

It was proved that since 1842, the use of the tannery on the plaintiff's lot had been discontinued, and the buildings formerly used for that purpose had been converted into a cabinet shop. That the water from the well immediately preceding the time of the obstruction, was used by the person occupying the old tannery as a cabinet shop, and by the plaintiff for the use of his family, and for watering cattle and other stock.

The defendant moved for a nonsuit, on the following grounds: —

1. That the reservation in the deed from Jacob Crounse to Peter Empie, reserved the water for a tannery only.

2. That the reservation was to Crounse only, and not to his assigns.

3. That the privilege of the water had not been conveyed by Jacob Crounse to Christopher Crounse, nor by him to the plaintiff, and that it did not pass as an appurtenance to the land.

4. That the tannery having been discontinued before the plaintiff purchased the land, all right to the water either in Jacob Crounse or his assigns had ceased.

The court denied the motion, and (the parties having no further evidence) directed the jury to find a verdict for the plaintiff. The defendant's counsel excepted. The jury found a verdict for the plaintiff, with nominal damages.

The defendant made a bill of exceptions, upon which a motion for a new trial was made before the Supreme Court in the Third District, and denied. From that decision the defendant appealed.

A. Taber, for appellant.

Thomas Smith, for respondent.

McCOUN, J., delivered the opinion of the court.

The first question presented by the bill of exceptions taken on the trial, relates to the admissibility of oral proof of the handwriting of a subscribing witness to a deed which the plaintiff offered in evidence. It appeared that the subscribing witness (Hezekiah Sharp) was dead. His signature was proved: the person proving it testifying also that Sharp was reputed to have been a commissioner of deeds of Albany

County and to have resided in Guilderland. The deed was of land lying in Schoharie County, where the trial took place. By an indorsement on the deed, it purported to have been acknowledged by the grantors before Sharp as a commissioner; but there was no certificate of the clerk of Albany County of his being such commissioner. The defendant's counsel therefore objected to the proof of Sharp's signature as a subscribing witness, on the ground that the acknowledgment was the best evidence, and that the plaintiff was bound to authenticate the act of Sharp in that respect by the official certificate of the clerk of Albany County. The objection was overruled, and I think properly so. It was not necessary to the validity of the deed that it should have been acknowledged, except so far as to render it effectual against the wife, to bar her right of dower. For every other purpose the deed took effect from delivery without any such acknowledgment. The statutory mode of proof with a view of preserving the evidence of its due execution, and of recording the instrument may be dispensed with. There is nothing to render it compulsory, nor has the Statute declared that an acknowledgment shall be deemed the best evidence of its due execution. It has only made it the most convenient evidence, for the sake of grantees or purchasers. If a deed has not been acknowledged and certified, to entitle it to be recorded or used as evidence under the Statute, it may still be proved in the common law method, by calling the subscribing witness to the stand, or by any secondary evidence which the rules of law admit of; none of which rules have been abrogated or entirely superseded. It is true that the proof given on the trial in this instance was of a secondary character; but it does not appear that it was in the plaintiff's power to have furnished any better. From the mere rumor that Sharp had been a commissioner of deeds, even corroborated by what appeared to have been written on the deed by him, the court could not assume that the clerk of Albany County would be able to certify to the fact of his being a commissioner, and moreover, to his handwriting. Without certainty as to both those particulars, how could it be said that better evidence existed, and was in the plaintiff's power to give, than was given by proof of the handwriting of the subscribing witness, he being dead? Admitting such evidence was therefore, under the circumstances, no infringement of the rule which requires that the best evidence shall be given which it is in the party's power to give, and which only excludes secondary evidence when it manifestly appears, that higher or better evidence is accessible and can be produced.

We now come to the merits of the case, which depend upon the legal effect of the reservation in the deed, and its true meaning. The reservation is first found in the deed from Jacob Crounse and wife to Peter Empie, dated May 12, 1830. The clause in question is both an exception and a reservation. The exception is of one acre and a half, included within the boundaries of the fifty-one acres, granted by the deed. Such is the effect, though the words used are the words of reservation, as follows: "They the parties of the first part do hereby

reserve to themselves, and their heirs and assigns, one acre and a half of land out of the above described premises at the south-east corner of lot No. 11, and on which the tannery is erected." It is the proper office of an exception in a deed, as distinguished from a reservation, to except from the operation of the deed, a part of that which is granted, or comprised within the generality of its terms. It must be of such a part as is severable from the rest. 1 Preston's Shep. Touch. 78; 21 Wend. 290; 4 Edw. Ch. R. 711. This is the case with respect to the one acre and a half comprising the tannery.

Then follows in the same clause of the deed, what is properly a reservation. For a reservation is always of something issuing, or coming out of, the thing or property granted, and not a part of the thing itself; and to be good, it must always be to the grantor, or party executing it, and not to a stranger to the deed. 1 Preston's Shep. Touch. 80. The words of this clause are, "And that the parties of the first part do also reserve to themselves and their use a certain *well* and *water courses*, laid down for the purpose of supplying the tannery aforesaid with water." This is doubtless good as a reservation, and it constitutes an easement in the land which was granted by the deed, in favor of the part excepted from its operation, viz., the one acre and a half, as to which this right of water in the other land, became appurtenant.

Neither is there any doubt that the subsequent conveyance by Peter Empie to Peter Empie, junior, of the property described in the deed from Crounse and wife, where the exception and reservation were first made, conveyed the property subject to the easement which had thereby been created, and that this last grantee, the defendant in this cause, who is now the appellant, is bound to the same observance, and stands in the same situation with regard to it, as the first grantee. So too the successive conveyances starting from Crounse and wife, and coming down to Borst the plaintiff below, of the one acre and a half, carried with them the right to the water so reserved as incident, or appurtenant, to this last mentioned property. *Burr* v. *Mills*, 21 Wend. 290. The parties before the court therefore occupy the positions of the respective parties to the deed containing the exception and reservation, and it is by the terms of that reservation, that the right between them must be determined, in the same manner as though they had been the original parties to it.

The question is one of legal construction as to the extent of the reservation; whether it carries along with it, a general and indefinite use of the water, or a restricted use and application of it. This becomes the important question, because, the premises being no longer used as a tannery, the water is not required for that purpose, but is nevertheless claimed by the plaintiff for all ordinary domestic purposes.

We have already seen that the acre and a half of land was properly a matter of exception in the deed, and not of reservation. Should we say that the "well and water works," as they are called, were also to be understood as the subject of exception, there would be a difficulty

in sustaining the clause which should except them, on account of the repugnancy it would create, to the grant of the land itself. 1 Preston's Shep. Touch. 88, n. 82. But viewing the "well," and the "water works," both artificial structures, upon, or in, the land, and the use of which is reserved, as constituting an incorporeal hereditament (for such it is), then they were properly the subject of a reservation, and free from the objection of repugnancy. As an incorporeal right, or easement, it consists in the privilege of drawing the water from the fountain, or well, where it rises, and of conducting it by means of the pipes laid in the ground, to the place where the tannery was erected. But is the use of the water restricted to the business or the purposes of such tannery? In determining this point, which is the important one in the case, we are to hold to a strict construction of the words of the reservation as against the party whose words they are, and against him (the plaintiff in this cause) who stands in the place of that party; and if an advantage can be gained from any uncertainty or ambiguity in the words, the defendant is entitled to the benefit of it. 1 Prest. Shep. Touch. 88; 3 John. R. 387; 8 Ib. 400. But I am at a loss to discover any uncertainty or ambiguity, either in the words or manner in which this reservation is expressed.

The only words which are at all calculated to show that a special use was to be made of the water are the words, "for the purpose of supplying the tannery aforesaid with water." But these words appear to have no connection with, or reference to, the object or cause for making the reservation. In their immediate connection, they are only descriptive of what is reserved; viz., "a certain well and water works laid down for the purpose," &c. They are not restrictive therefore of the use to be made of the water, and only serve to identify the subject of the reservation, while the reservation itself is expressed in the most general way, without any limit whatever as to the manner of using the water, or the future purpose to which it might be applied. Taking the whole sentence together as we find it in the deed, the words are plain and unambiguous. There is only one way by which a different meaning can be arrived at, and that is by transposing some of the words, and breaking up their present connection. For instance, if instead of leaving the words, "for the purpose of supplying the tannery aforesaid with water," at the end of the clause, where they merely define the object of the "well" and the "water works," we could advance them, so as to form a connection with the word "use," we might then say, the water had been reserved for a special and particular purpose, as contended for on the part of the defendant below. But we are not at liberty to make so important an alteration as this, in the whole structure of the sentence. There is nothing in the case to warrant it, and we must be governed therefore by the words as they stand in the deed; in which there is no restraint placed upon the use to be made of the water when brought to the premises now owned by the plaintiff in the action. *Judgment affirmed.*

WINTHROP *v.* FAIRBANKS.

SUPREME JUDICIAL COURT OF MAINE. 1856.

[*Reported* 41 *Me.* 307.]

On report from *Nisi Prius*, *Cutting*, J., presiding.

This was an action of the case for disturbing a way which the plaintiffs claimed across land of the late Elijah Fairbanks, jr., the father of the defendant.

After the evidence was out, the cause was taken from the jury by consent, and referred to the law court, with power to find such facts and draw such inferences as a jury might. If, upon the evidence, the court were of opinion that the plaintiffs had a right of way, as alleged by them, the defendant was to be defaulted for nominal damages; otherwise, the plaintiffs were to become nonsuit.

The facts in the case are fully stated in the opinion of the court.

Bradbury and *Morrill*, for defendant; *Lancaster*, for plaintiffs.

TENNEY, C. J. For some years prior to the year 1811, Elijah Fairbanks, sen., owned a tract of land north and south of Narrow's pond, so called, and extending therefrom to the east and to the west. It is understood that the residence of the owner was on the north side of the pond. In order to have a convenient mode of access to the land upon the south of the pond, he constructed a way from one side to the other around the eastern end of the pond, as early as the year 1807.

On June 3, 1811, he conveyed a parcel of this land, situated upon the north side of the pond and called the thirty-two acre piece, to his son, Elijah Fairbanks, jun., with the following clause after the description of the land conveyed: "Reserving forever for myself, the privilege of passing with teams and cattle across the same, in suitable places, to land I own to the south of the premises."

By an arrangement between Elijah Fairbanks, sen., and his sons Elijah, John, and Jesse L. Fairbanks, on Jan. 22, 1819, the father conveyed to each of the sons other portions of his estate; to John a lot next south of that which he had conveyed before to Elijah; to Jesse L. the parcels which are now owned by the plaintiffs; and to Elijah a lot still farther south, and in each of these deeds was the following, after a description of the premises: "Reserving to myself, and my heirs and assigns, the privilege of a bridle road or way, in any suitable place, for the purpose of passing and repassing with creatures and teams to and from any adjoining land, owned by any of them."

The deed from Jesse L. Fairbanks to the plaintiffs, dated April 15, 1837, contains the following after the premises are described: "Also a right of way to the said the inhabitants of the town of Winthrop, their successors and assigns forever, for all purposes necessary and convenient, to and from the premises last described, across the land of said Elijah and John Fairbanks, according to reservations of right of way

in their deeds of said land from my late father, and as has been used and enjoyed in carrying on and managing the land hereby conveyed, in passing to and from the several parcels thereof, through and across the land of said Elijah and John Fairbanks."

The defendant is the son of Elijah Fairbanks, jun. (who died about four years before the trial), and he forbade and prevented the plaintiffs from passing over the parcel conveyed to his father in 1811, upon the way thereon constructed, in going from one part to another of the land held under the deed of Jesse L. Fairbanks to them. And the legal question presented by the report and argument, is whether they had the right of passage attempted to be exercised.

The defendant denies the right of the plaintiffs to pass over the land conveyed to his father on June 3, 1811, on the ground that the reservation was of a right of way, *in gross* to the grantor alone, and did not pass to Jesse L. Fairbanks, and could not therefore be transmitted by the latter to the plaintiffs; or at any rate, the right could not exist after the death of Elijah Fairbanks, sen., which occurred in 1836. The plaintiffs do not admit that the reservation in the deed of Elijah Fairbanks, sen., to his son Elijah, of June 3, 1811, is one in gross to the grantor only, but that the land conveyed by that deed is charged with the easement and servitude annexed to the lands, which continued to be owned, after that deed by the grantor, as appurtenant thereto.

A reservation has sometimes the force of a saving or exception. Co. Lit. 143. Exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly created out of the lands and tenements demised, though exception and reservation have been used promiscuously. Co. Lit. 47 a. And it is well settled, that in giving construction to instruments in writing, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated. Hence, the distinction between an exception and a reservation is so obscure in many cases, that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost.

If the reservation in the deed of Elijah Fairbanks, sen., is to be treated as an exception and the recognition of a way over the land described, then being made by the owner of the land for himself, while he was in the occupation and use thereof, it would confer the benefit of an exception to the grantor, his heirs and assigns, as occupants of the remaining lands belonging to him, and it would become appurtenant to these lands; and no words of inheritance would be necessary. It was a right, which, if an exception, did not pass to the grantee. This doctrine is fully recognized, in the cases cited for the plaintiffs, of *White* v. *Crawford*, 10 Mass. 183; *Murdell et al.* v. *Dehon*, 7 Met. 176; *Bowen et al.* v. *Conner*, 6 Cush. 132. In the last case it is said, that the

law in Massachusetts is settled by a series of decisions, that a right of way may be as well created by a reservation or exception in the deed of the grantor, as by a deed from the owner of the land to be charged.

The evidence reported shows, that Elijah Fairbanks, sen., regarded the passage across the parcel first conveyed to his son Elijah, to his lands south of the pond, as a convenient, if not a necessary mode of having access thereto, while he was the owner of the whole; as he had prepared a road thereon for that purpose. When he conveyed the thirty-two acre piece, he retained the right to pass over the same forever to himself. When he alienated the lands south of the pond, it was equally important to those who had an interest therein, and who owned a part or the whole of his lands on the north side, that this right of passage should continue to them, as to have previously existed in him. And if there had been no reservations in the deeds given by the grantor to his sons on Jan. 22, 1819, we are entirely satisfied, that the right of way reserved, or excepted in his deed of June 3, 1811, was intended for the benefit of his lands on the south side of the pond, and was annexed as appurtenant thereto, and would have passed by his deed to Jesse L. Fairbanks, and from him to the plaintiffs.

On other grounds, we think the right of passage over the thirty-two acre lot, clearly exists in the plaintiffs. The grantee in a deed poll, by its acceptance, becomes bound by all the restrictions, limitations, reservations, and exceptions contained in it; and the deed may charge other lands with a servitude than those which were the subject of conveyance. *Vickerie* v. *Buswell*, 13 Maine, 289; *Norell* v. *Hill*, 2 Met. 180.

On Jan. 22, 1819, Elijah Fairbanks, sen., was the owner of the whole estate excepting the thirty-two acre lot previously conveyed to his son Elijah. Over the portion so conveyed, it is admitted he had the right of way to his lands on the south of the pond. On that day he made several conveyances of parts of his farm, remaining, to his three sons, one of whom was Elijah, with the reservations therein contained. These deeds were accepted, and the grantees became bound by exceptions, which were for the benefit of the grantor, his heirs and assigns. The exceptions were not limited to the right of passage over lands conveyed at that time, but they extended it to and from any adjoining lands, owned "by any of them." Elijah Fairbanks, jr., was then the owner of the land conveyed to him on June 3, 1811, and the land was adjoining a part of that conveyed to Jesse L. Fairbanks, the plaintiffs' grantor. This reservation or exception would therefore apply to the lot of land over which the defendant denies to the plaintiffs the right of passage; and the interruption of this right was a wrong on the part of the defendant, for which this action can be maintained.

Defendant defaulted.

Judgment for damages in the sum of one dollar.

HATHAWAY and CUTTING, JJ., concurred.

RICE, J., concurred in the result.

MAY, J., did not sit.

LAMPMAN *v.* MILKS.

COURT OF APPEALS OF NEW YORK. 1860.

[*Reported* 21 *N. Y.* 505.]

APPEAL from the Supreme Court. Action for changing the course of a stream, and flooding the plaintiff's land. Upon the trial, at the Otsego Circuit, before Mr. Justice *Crippen*, a jury having been waived, these facts appeared: On the 27th March, 1850, Ovid Chesebro owned forty acres of land on Elk Creek, through which there was a small brook running. In its natural course it would have run over half an acre of low ground, which Chesebro on that day conveyed to the plaintiff for a building lot, and upon which the plaintiff immediately thereafter erected a house and barn. Some ten years previously, the owner of the forty acres had diverted the stream through an artificial channel, carrying it into Elk Creek in such a manner as not to flow over the plaintiff's land. On the 1st of April, 1850, Chesebro conveyed the residue of the forty acres to the grantor of the defendant. In 1854 the defendant dammed up the entrance to the artificial channel, so as to cause the stream to run in its original bed and to overflow the plaintiff's yard, which was the injury complained of. The judge ordered judgment for the defendant, which having been affirmed at General Term in the Sixth District, the plaintiff appealed to this court. The cause was submitted on printed arguments.

E. E. Ferry, for the appellant.

B. J. Scofield, for the respondent.

SELDEN, J. Although this is an action of a very trivial nature, in respect to the amount which it involves, it nevertheless embraces principles of very considerable importance, and should, therefore, be carefully considered. It was clearly established upon the trial that, at the time when the plaintiff purchased and took a conveyance from Chesebro, the stream in question, instead of running in its original channel, through the entire length and across the south line of the plaintiff's lot, had been turned through an artificial channel across the north line on to the other portions of the forty acres, and thence into Elk Creek; thus leaving the whole of the southern portion of the plaintiff's lot, upon which he subsequently built his house and barn, dry and free from the encumbrance of the stream, which had originally spread over a considerable portion of the lot. It did not distinctly appear how long the stream had run in this artificial channel prior to the conveyance of the lot by Chesebro, nor do I deem this of any importance. It was several months, at least. The question is, whether, after conveying this lot and its appurtenances to the plaintiff, with the stream then running in the artificial channel on to adjoining premises of his own, either he or

his grantees would have a right afterwards to obstruct this channel, and turn the water back through its original course across the entire lot.

The owner of real estate has, during his ownership, entire dominion and control over its various natural qualities, and may dispose of and arrange them at will. He may alter the natural distribution of those qualities, so as essentially to change the relative value of the different parts; and may, in a great variety of ways, make one portion of the premises subservient to another. The precise question in this case is, whether an owner, who, by such an artificial arrangement of the material properties of his estate, has added to the advantages and enhanced the value of one portion, can, after selling that portion with those advantages openly and visibly attached, voluntarily break up the arrangement and thus destroy or materially diminish the value of the portion sold.

The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts.

These principles are so obviously just, that we might be warranted in applying them to the present case for that reason alone. But they are also sustained by ample authority. The oldest case on the subject appears to be that of *Cloyy*, 11 Henry VII., 25, cited from the Year-Books by Gale and Whatly, in their work on Easements, page 41. That was an action on the case for stopping a gutter running from the building of the plaintiff over the adjoining building of the defendant. The plea was, that, within the time of memory, both buildings had belonged to the same individual, who had sold one of them to the plaintiff and the other to the defendant; and that the easement, if it ever existed, was extinguished by this unity of ownership. But the court held this to be no defence. It was, however, conceded that if the owner

of both tenements, before selling either, had destroyed the gutter, and then sold, the gutter could not have been restored. This case was identical in principle with the present, and fully sustains what has been here said. It shows that, if the owner of an entire property wishes to put an end to a burden, which has been imposed upon one portion for the benefit of another, he must do so before he sells the portion benefited.

But the leading case, and the one which has always been regarded as settling the law upon this subject, is *Nicholas* v. *Chamberlain*, Cro. Jac. 121, in which, to use the language of Croke, "It was held by all the court, upon demurrer, that, if one erect a house, and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require." The authority of this case has never been shaken, but, on the contrary, it has been referred to with approbation, in all the subsequent cases in which this question has been involved.

The same doctrine was laid down in the case of *Robbins* v. *Barnes*, Hob. 131. It was there held, that when one of two adjoining houses was originally built in such a manner that one overhung a portion of the other, although this overhanging was originally wrongful, yet if both houses should come afterwards to be owned by one individual, and he should sell them to different persons without alteration, the purchaser of the overhanging house would thereby acquire a right to maintain his house in that condition, and when it decayed to pull it down and build another of the same description. But the court at the same time held, that although the overhanging was at first rightful, yet if one, owning both houses at the same time, had removed the overhanging portion, and then sold to different persons, the overhanging could never be renewed; because the houses, as the court say, "must be taken as they were at the time of the conveyance." The whole principle is contained in the few words here quoted.

There are several American cases holding the same doctrine. The first to which I shall refer is that of *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190. A tract of land had been conveyed by metes and bounds, having upon it a mill; and, at the time of the conveyance, there was a raceway to conduct the water from the mill, running along the side of the natural stream beyond the bounds of the land granted into other lands of the grantor, and then discharging the water into the natural stream. The court held, that a right to have the water flow off uninterruptedly, through the whole extent of the raceway, passed as appurtenant to the mill. It has been suggested that the decision in this case was produced by the peculiar phraseology of the deed, which mentioned "water privileges and all other privileges annexed to or

belonging to said premises;" but no stress is laid upon this language by the court in deciding the case. On the contrary, it is put expressly upon the principle of the case of *Nicholas* v. *Chamberlain*. The Chief Justice quotes that case at length, and then says: "The rule here laid down seems to be founded in sound reason and good sense, and to apply, in all its force, to the case now before us."

Another case, equally in point, is that of *United States* v. *Appleton*, 1 Sumner, 492. A block of buildings was erected in Boston, in 1808, consisting of a central building and two wings, with a piazza in front of the central building, and side doors in the wings, which opened on and swung over the piazza, the upper parts of which were used as windows. The wings were conveyed in 1811 to different parties, without mentioning the side doors, and in 1816 the central building was sold to the United States. It was held that the use of the side doors and windows passed as appurtenances, without any reference to the length of time during which they had been used. In this case, also, the case of *Nicholas* v. *Chamberlain* was referred to and relied upon by Judge Story. The same judge has also fully recognized the doctrine, in the previous case of *Hazard* v. *Robinson*, 3 Mason, 272.

I shall not cite that large class of cases in which various privileges and easements have been held to pass as appurtenances, where the conveyance uses some comprehensive word, such as manor, messuage, farm, mill, and the like, as descriptive of the whole subject of the grant, because those cases are explained upon the ground that all the privileges in use, as parts of the thing conveyed, are virtually included in the general designation of the thing as a whole. This criticism, however, has no application to the cases already cited, nor to that to which I will next refer, namely, *Thayer* v. *Payne*, 2 Cush. 327. The plaintiff and defendant were the owners and occupants of adjoining lots of land, the defendant having derived his title from the plaintiff. At the time of the conveyance from the plaintiff to the defendant, there was a drain from the defendant's cellar leading through the plaintiff's premises to an outlet beyond. This drain was not mentioned in the deed. The drain being out of repair, the defendant entered upon the premises of the plaintiff for the purpose of opening it; and for this entry the action was brought. It was held that the defendant had a right to maintain the drain, and to enter upon the plaintiff's premises for the purpose of repairing it, notwithstanding the deed contained the following clause: "To have and to hold the aforegranted premises, with the privileges and appurtenances thereto belonging, at the time of the purchase thereof by the said Thayer and French;" and, notwithstanding it appeared that the drain had no existence at the time referred to in this clause, it having been constructed afterwards, but before the conveyance to the defendant. The decision was put upon the ground that, as the plaintiff owned both lots at the time of his conveyance to the defendant, and as the drain was then in existence and use, it passed as an appurtenance without being mentioned, and without even the use of the

word appurtenances; and, hence, it could not be affected by the clause in the deed. It is hardly possible to conceive of a stronger case than this, for the support of the principles here advanced.

There are one or two other classes of cases, which, by the distinctions they involve, present the principles upon which this case depends in so clear a light, that it may be well to advert to them. One of these classes comprises those cases which relate to the obstruction of windows. It is well settled, that, as a general rule, if the owner of a building has windows overlooking an adjoining lot, the owner of the latter may build directly in front of the windows so as entirely to obstruct their light, unless they are shown to be *ancient*. If, however, both proprietors obtained their title from a common source, the same grantor having conveyed the tenement with the windows to one, and the ground overlooked to another, the windows cannot be obstructed; and the reason is, that the relative qualities of the two tenements must be considered as fixed at the time of their severance, each retains, as between it and the other, the properties then visibly attached to it, and neither party has a right afterwards to change them. These principles are distinctly stated in a very early case, viz., *Cox* v. *Matthews*, Ventris, 237, which was an action for stopping lights. Lord Hale laid down the rule in this case as follows: "That if a man builds a house upon his own ground, he that hath the contiguous ground may build upon it also, though he doth thereby stop the lights of the other house: for, *Cujus est solum, ejus est usque ad cœlum;* and this holds, unless there be a custom to the contrary, as in London. But in an action for stopping of his light, a man need not declare of an ancient house; for if a man should build an house on his own ground, and then grant the house to A, and grant certain land adjoining to B, B could not build to the stopping of its lights in that case."

The first portion of the rule here laid down, although well established in England, has not been adopted in this State; but, on the contrary, was expressly rejected, in the case of *Parker* v. *Foote*, 19 Wend. 309, for the reasons there given. This decision, however, has no bearing upon the doctrine, that, if a man builds a house, at the same time owning both the site of the house and the adjoining land, and then sells the house, neither he nor his grantees can afterwards build upon the vacant ground so as to obstruct the windows of the house.

I will refer to one or two of the cases on this latter branch of the rule, laid down by Lord Hale in *Cox* v. *Matthews*, for the purpose of showing that the principle upon which they rest is identical with that involved in the present case.

Palmer v. *Fletcher*, 1 Lev. 122; 1 Sid. 167, s. c., was an action for stopping lights. It appeared that the owner of land erected a house upon it, and, after selling the house to one, sold the vacant ground to another, who obstructed the windows of the house. The court held that neither the builder of the house himself, nor any one claiming under him, had a right to build upon the vacant ground so as to interfere with

the existing windows, giving, as a reason, that the grantor of the house could not derogate from his own grant. Kelynge, J., however, said, that if the vacant ground had been sold first, and the house afterwards, the purchaser of the ground might then have stopped the lights; but Twisden, J., denied this, saying that, "whether the land be sold first or afterwards, the vendor of the land cannot stop the lights of the house, in the hands of the vendor or his assignees; and cites a case to be so adjudged."

If we consider the reason of the rule, we shall see at once that, in this conflict of opinion, Mr. Justice Twisden was clearly right. The principle is that so concisely stated in *Robbins* v. *Barnes (supra)*, that, upon the severance of two tenements belonging to the same owner, by the conveyance of one or both, they must be taken as they were at the time of the conveyance. If, therefore, the owner retains the tenement benefited, and sells that upon which the burden has been imposed, the purchaser takes the latter with the burden or servitude annexed. The time during which the lights have been enjoyed, has nothing to do with the rule in these cases. Whether they have existed for twenty years, or for a single day, they are equally protected. The doctrine has been adhered to in all the later English cases. *Riviere* v. *Bower*, Ry. & Mo. 24; *Compton* v. *Richards*, 1 Price, 27; *Coutts* v. *Graham*, 1 Mo. & Mal. 396.

I will refer, upon this point, to but a single American case, viz., *Story* v. *Odin*, 12 Mass. 157. This was an action for stopping lights not alleged to be *ancient*. The essential facts of the case, and the point of the decision, are very clearly stated in the following extract from the opinion of Jackson, J.: "The town of Boston, in the year 1795, owned the two pieces of land now owned by the plaintiff and defendant. They then sold to the plaintiff the piece now owned by him. This piece then had upon it a building, like that afterwards erected by the plaintiff upon the same foundations, and with doors and windows corresponding to those in the new building. *This grant being without any exception, or any reservation of a right to build upon the adjoining ground, or to stop the lights in the building which they sold*, it is clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant. As they could not do this themselves, so neither could they convey a right to do it to a stranger. No lapse of time was necessary to confirm this right to the plaintiff."

This case is important, because it expressly shows that the court considered the question, whether it is incumbent upon the purchaser to secure, by covenant, existing benefits not naturally belonging to the tenement purchased, but previously conferred upon it at the expense of other lands of the grantor; or whether the grantor must himself guard against transferring the right to such benefits. The conclusion, as we have seen, was, that such benefits remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved.

There is still another class of cases which illustrate and support the

same doctrine. If a man has a house standing directly upon the line of his lot, he has, in general, no remedy against the owner of the adjoining ground, who, by excavating upon his own land, has weakened the foundation of the house so as to cause it to fall. So, also, if the house is partially supported by a building upon the adjoining lot, the owner of the latter building may pull it down, although, in consequence of its removal, the house should fall. If, however, the house and the adjoining premises have both belonged to the same individual at any time subsequent to the building of the house, the owner of the house would, upon the severance of the two tenements, have acquired a right to all the support at that time afforded by the adjoining premises. The cases on this subject are numerous, but I will refer to two only.

Peyton v. *The Mayor, &c., of London*, 9 Barn. & Cres. 725, was an action on the case to recover damages for pulling down an adjoining house, in consequence of which the plaintiff's house was impaired and partly fell. It was held, that, as the plaintiff had not alleged or proved any right to have his house supported by the defendant's, he was bound to protect himself by shoring. It was, however, impliedly conceded, that, if the houses had been built or owned by the same person, and afterwards passed into different hands, such a right would have existed. Lord Tenterden, in giving his reasons for the decision, says: "It did not appear whether the two houses had been erected at the same time, or at different times: from their construction, it seems likely that they were built at or about the same time. The freehold was then in different hands: and as the governors of the hospital (the defendants) are not likely to have bought or sold in modern times, it is probable that the freehold was also *in different hands* when the houses were built." This seems plainly to imply, that, if the houses had been in the same hands when built, an easement, or right to support, would have existed.

Chancellor Walworth, in the case of *Lasala* v. *Holbrook*, 4 Paige, 169, adverts to the same distinction. The object of the action there was to obtain an injunction, restraining the defendants from excavating upon their own lot in Ann Street, in the city of New York, so as to endanger the walls of a church standing upon the adjoining lot. The object of the defendants, in excavating, was to erect a building upon their lot. It was held, that, if a person, in excavating for the improvement of his own lot, digs so near the foundation of a house on an adjoining lot as to cause it to settle or fall, he will not be liable for the injury if he has exercised ordinary care and skill in making the excavation. But the Chancellor said: "There is another class of cases, however, where the owner of the building on the adjacent lot is entitled to full protection against the consequences of any new excavation, or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations, and which, by prescription, are entitled to the special privilege of being exempted from the consequences of the spirit of reform operating upon the owners of the

adjoining lots: *and also those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title.*" It will be seen, therefore, that there is an entire concurrence in principle among all the various classes of cases to which I have referred.

There is one other distinction, having a direct bearing upon this question, not yet adverted to. It is not every species of easement which passes as a matter of course by the conveyance of one of two tenements, or part of a single tenement, by the owner of both or the whole. Easements, or servitudes, are divided by the civil code of France into continuous and discontinuous. Continuous are defined to be those, of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man; as a water-spout, or right to light or air. Discontinuous are those, the enjoyment of which can be had only by the interference of man; as rights of way, or a right to draw water.

Servitudes are also divided, by the same code, into "apparent" and "non-apparent." The analogy between the common law and the French code, in this respect, would seem to indicate, as suggested by Messrs. Gale and Whatly, a common origin. The substance of those divisions may be distinctly traced in the common law cases; and it will be found, that those easements which, according to this classification, are termed discontinuous, pass upon a severance of tenements by the owner only when they are absolutely necessary to the enjoyment of the property conveyed. Gale and Whatly, after stating the grounds upon which easements are held to pass in such cases, say: "This reasoning applies to those easements only which are attended by some alteration which is, in its nature, *obvious and permanent;* or, in technical language, to those easements only which are apparent and continuous; understanding, by apparent signs, not those which must *necessarily* be seen, but those which *may be* seen or known, on a careful inspection by a person ordinarily conversant with the subject." Gale and Whatly on Easements, page 40.

This distinction may serve to explain a few of the cases, particularly in Massachusetts, which might otherwise seem to be in conflict with the numerous cases which have been cited. In the present case, the servitude was not only permanent, but perfectly obvious and apparent, at the time of the conveyance to the plaintiff, and must, therefore, according to all the authorities, have passed by the deed.

The judgment should, therefore, be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurring,

Judgment reversed, and new trial ordered.[1]

[1] See *Ingalls* v. *Plamondon*, 75 Ill. 118; *John Hancock Ins. Co.* v. *Patterson*, 103 Ind. 382.

CARBREY *v.* WILLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported* 7 *Allen*, 364.]

CONTRACT to recover damages for the breach of the covenants of warranty and against encumbrances in a deed of land on Atkinson Street, in Boston, bounded in part as follows: "Southerly on land now or late of Benjamin Gould, there measuring sixteen feet and six inches; westerly again on the same, there measuring sixteen feet; and southerly on land now or late of the heirs of Cowell, there measuring forty-eight feet, more or less, to said Atkinson Street, or however otherwise bounded or described." The declaration alleged that the premises conveyed were subject to a right of drainage across the same, and also to the right to have the eaves on the estate on the southerly side thereof overhang said land, and the water drip therefrom.[1]

At the trial in the Superior Court, before *Ames*, J., the execution of the deed by the defendant, which was dated May 1, 1848, was admitted. It appeared in evidence that in 1812, and for many years before that time, the granted premises, and also an estate on High Street, in favor of which the alleged right of drainage was claimed, belonged to George Blanchard; and that in 1812 Blanchard conveyed to Rebecca Richardson the estate described in said deed, by a deed of mortgage in the common form, with general covenants of warranty and freedom from encumbrances, to secure the payment of $5000 in two years with interest. The title under this mortgage and also the equity of redemption, which was taken on execution, became vested in the defendant as early as 1821. The title to the estate on High Street passed from Blanchard in 1815, and is now held by devisees of William Phillips, who acquired the title thereto in 1823.

The plaintiff introduced evidence tending to show that there was no trouble with the drain from the estate on High Street until 1857, when it became choked up, and flooded the cellar of the house from which it led, and a mason was employed to make examinations, and it was found that it passed through the plaintiff's land; and that the house upon the estate on High Street was an old house prior to the year 1812. The plaintiff testified that he had no knowledge of the existence of the drain until it was opened by the mason. There was no evidence when or under what circumstances the drain was originally constructed, except that the mason testified that it appeared as if it was built when the house drained by it was built. There was some conflict of testimony as to the practicability of draining from the cellar of the High Street estate into the High Street sewer.

[1] The part of the case which concerns the right to have the eaves is omitted.

"The judge ruled that, there being no evidence as to the precise time when the drain was constructed, and it being assumed that it was an ancient one, the burden was upon the plaintiff to show that the owners of the High Street estate had acquired a right to use it, and that, so long as both estates were owned in the same right by the same person, the use of the drain had nothing of the nature or character of an easement; that, after the ownership was severed and the two estates had passed into different hands, the fact that the High Street estate continued to be drained across the plaintiff's estate, without any evidence that the plaintiff or those under whom he claims had any knowledge or notice whatsoever of the fact, would not amount to such an adverse use or such a claim of right as by mere use and lapse of time to create a right of easement, and that such use, not being open and notorious, would not establish the right, unless shown expressly to have come to the knowledge of the owners of the plaintiff's estate.

"The judge also ruled that, although a drain attached to and used by the High Street estate would generally be held to be appurtenant thereto and to pass by any deed or conveyance thereof, independently of any prescriptive title or right acquired by adverse use, yet under the circumstances of this case, the drain being assumed by both parties to have been in use previously to the year 1812, and the owner at that time, Blanchard, having conveyed by mortgage the alleged servient estate to Richardson, with general covenants of warranty and freedom from encumbrances, the defendant, under the title deeds put in by him, making his title in part under the conveyance to said Richardson, held his estate in 1821 and afterwards relieved of this encumbrance; and that the owners of the High Street estate, claiming under said Blanchard, are estopped and barred, by the previous deed from said Blanchard of the other estate, from claiming the drain in controversy as appurtenant to their estate."

A verdict was rendered for the defendant, by the direction of the judge, and the facts and evidence were reported for the revision of this court.

D. Thaxter and *F. Barthett*, for the plaintiff.

C. M. Ellis and *E. Pearson*, for the defendant.

HOAR, J. The first ruling made by the judge who presided at the trial was entirely correct. While both estates were owned by Blanchard, no easement could be created by any use of the drain for the benefit of one of them. And after the ownership was severed, the continuance of the drain would have no tendency to prove the acquisition of an easement by adverse enjoyment, because the use was not open or visible, or known to the owners of the estate upon which it would be imposed.

In the next place, it is clear that the conveyance by the mortgage to Rebecca Richardson in 1812, with full covenants of warranty, would estop the grantor and those claiming under a title subsequently derived from him, from claiming any interest in the mortgaged premises.

When the mortgage was foreclosed or merged in the equity of redemption, the title of the mortgagee became absolute and indefeasible to all the premises included in the mortgage deed at the time of its execution.

The only question, then, which arises on this part of the case is, whether anything was excepted from the grant to Richardson, as forming a part of the High Street estate which was retained by the grantor. The whole doctrine on this subject was reviewed and carefully stated in the case of *Johnson* v. *Jordan*, 2 Met. 234. The court in that case intimate the opinion "that if a man, owning two tenements, has built a house on one, and annexed thereto a drain passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee; whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms, when it naturally would be if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the encumbrance." The grants were in that case simultaneous. But where, as in the case at bar, the grant of the lower estate precedes that of the other, we think the true rule of construction is this: that no easement can be taken as reserved by implication, unless it is *de facto* annexed and in use at the time of the grant, and is necessary to the enjoyment of the estate which the grantor retains. And this necessity cannot be deemed to exist, if a similar privilege can be secured by reasonable trouble and expense.

The rule in respect to easements which pass by implication has been held with some strictness in this Commonwealth, even in the case where a grantee claims them as against his grantor, or where the question arises between grantees under conveyances made at the same time, or in cases of partition. Thus in *Grant* v. *Chase*, 17 Mass. 443, it was said that easements which are not named would not pass by a grant, "unless they were either parcel of the premises that were expressly conveyed, or necessarily annexed and appendant to them." In *Nichols* v. *Luce*, 24 Pick. 102, it was held that "convenience, even great convenience, is not sufficient" to make a right of way pass as appurtenant. To the same effect is *Gayetty* v. *Bethune*, 14 Mass. 49; and a similar conclusion is reached upon full discussion, by Mr. Justice Fletcher, in *Thayer* v. *Payne*, 2 Cush. 327.

In some recent cases in England a different doctrine seems to have prevailed; and even in the case of a grant of a part of an estate, an easement has been held to be reserved to the grantor as parcel of the remainder, without an express reservation, if it were *de facto* used in connection with it at the time of the grant, and were necessary to its enjoyment in the condition in which the estate then was. *Pyer* v.

Carter, 1 Hurlst. & Norm. 916; *Ecart* v. *Cochrane*, 7 Jur. N. S. 925; *Hall* v. *Lund*, Law Journ. Rep. May, 1863, page 113. In *Pyer* v. *Carter* it was held that it would make no difference in the application of the principle, if a new drain could be constructed on the plaintiff's own land at a trifling expense. The terms of the deed are not given in the report of the case, and the decision may perhaps be supported on the ground that the conveyance was of part of a house, having obvious existing relations to and dependencies upon the other part of the building. Thus it is a familiar principle that in a grant of a messuage, a farm, a manor, or a mill, many things will pass which have been used with the principal thing, as parcel of the granted premises, which would not pass under the grant of a piece of land by metes and bounds. In such cases it is only a question of the construction of terms of description.

But where there is a grant of land by metes and bounds, without express reservation, and with full covenants of warranty against encumbrances, we think there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. Where the easement is only one of existing use and great convenience, but for which a substitute can be furnished by reasonable labor and expense, the grantor may certainly cut himself off from it by his deed, if such is the intention of the parties. And it is difficult to see how such an intention could be more clearly and distinctly intimated than by such a deed and warranty.

The presiding judge ruled, as a matter of law, that no right of drainage was reserved under the deed to Richardson in 1812, and we have some doubt whether the evidence reported would have supported a verdict to the contrary. But as the case must go to a new trial upon another ground, and there was some evidence of the necessity of the drain, and the nature and extent of the necessity do not appear to have been distinctly presented as a subject of ruling by the court, it will be proper that it should be submitted to the jury under suitable instructions upon this point.[1]

[1] In *Brackett* v. *M'Laughlin*, 10 Allen, 366, and *Ives* v. *Ives*, 125 Mass. 257, the same rule was applied where there were conveyances on the same day to different purchasers. In *Watson* v. *Ehrle*, 54 Md. 276, the principal case was approved, and on a simultaneous conveyance of two adjoining closes, it was held that no way was created unless it was a matter "of strict necessity." See *Mitchell* v. *Seipel*, 53 Md. 251.

MULLEN *v.* STRICKER.

SUPREME COURT OF OHIO. 1869.

[*Reported* 19 *Ohio St.* 135.]

ERROR to the Superior Court of Cincinnati.

The plaintiff and defendant are the owners of adjacent lots, Nos. 51 and 53 Broadway, Cincinnati, on each of which is a four-story brick house. The house on No. 51 covers the entire lot, the centre of its south wall being the dividing line between it and No. 53. Between this wall and the house upon No. 53 is an area or space-way, some four or five feet wide, extending part the length of the wall. Several of the windows in the house on lot 51 open into and are lighted from this area. For many years prior to April 24, 1866, both lots, with the houses thereon, had been owned by Clement Deitrich, and occupied and used by him, in their present condition. On the 24th of April, 1866, Deitrich, in pursuance of a public notice, offered the lots for sale at auction, when lot 51 was struck off to the defendant in error, Francis Stricker, and lot 53 to another person. Stricker complied with the terms of sale, and, on the 30th of April, his lot was conveyed to him by Deitrich. The other purchaser failed to comply with the terms of sale; but before the execution of the deed to Stricker, the plaintiff in error, Mrs. Mullen, purchased lot 53, and on the first day of May, one day after the execution of Stricker's deed, she received her deed from Deitrich for lot 53. Both deeds contained covenants of general warranty, and against encumbrances, and in both, the centre of the partition wall aforesaid is described as being the boundary line between the lots. It is admitted that a substitute for the windows opening into the area can be had, by which air and light will be provided from above, at an expense of from $300 to $1500.

Shortly after the execution of these deeds, Mrs. Mullen being about to obstruct the windows aforesaid, by building upon and filling up the area from which they were so lighted, Stricker brought his action against her in the Superior Court of Cincinnati, to enjoin her from so doing. The cause was reserved by that court for hearing in General Term, where a perpetual injunction was awarded; and Mrs. Mullen now seeks to reverse the judgment of the Superior Court by her petition in error here.

Hoadly, *Jackson*, and *Johnson*, and *J.* and *R. A. Johnston*, for plaintiff in error.

Stallo and *Kittredge*, for defendant in error.

WELCH, J. The whole case is a question of the construction of Deitrich's deed to Stricker. If Stricker has any right to the easement in controversy, he acquired it by that deed. That the deed does not expressly grant the easement, is admitted. Its language is unequivocal, making the "partition wall" the dividing line between the two lots.

Nor is it claimed that the easement had attached or become appurtenant to lot 51, by user or prescription. On the contrary, it is conceded, and so we understand the law to be in Ohio (*Hiett* v. *Morris*, 10 Ohio St. 523; Washb. Easm. 470), that no prescriptive right to the use of light and air through windows can be acquired by any length of use or enjoyment. But it is claimed that the easement is granted by implication, arising upon the circumstances surrounding the execution of the deed. In other words, it is claimed that the grant is to be implied from the fact that the windows were in use at the time of the conveyance, and were necessary to the convenient enjoyment of the property, and that this implication is not rebutted by the fact that the lots were simultaneously sold at auction.

In the view we take of this case, it is unnecessary to consider the effect of the circumstance that the lots were simultaneously sold at auction. In a proper case, no doubt, that fact might go far to rebut the implication of a grant, and there are a number of decisions to that effect. In such a case it would, perhaps, be quite immaterial which deed was executed first, as the parties to the first deed would be held to have known and intended, at the time of its execution, that the other deed was to be executed also, and was to be made conformable to the terms and conditions of the sale, neither purchaser having any preference over the other. But we place our decision of the case upon other grounds, and need not, therefore, discuss the question whether it is varied by the fact that the lots were simultaneously sold.

Nor do we deem it necessary to discriminate between the case of an implied grant and that of an implied reservation in a grant. Some of the early English decisions stand upon the ground of such a distinction, holding that the same circumstances, of necessity or use, which would support an implication of grant, where the *dominant* estate is first sold, will not support an implication of reservation where the *servient* estate is first sold.

What we hold is, that the law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another in any case. In our view, therefore, the law of the present case is not in the least varied by the fact that the dominant estate was conveyed first, or by the fact that both lots were sold at the same time. It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the kindred doctrine of "ancient windows," or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community. Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating, and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary

buildings, the application of the doctrine would be attended with great uncertainty, and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual encumbrance upon the servient estate, and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good, to leave the parties, on questions of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts.

We know that the authorities on this subject are not uniform. But we believe the weight of American decisions is in accordance with the opinion here expressed. See *Maynard* v. *Esher*, 17 Penn. St. 222; *Haverstick* v. *Sipe*, 33 Id. 368, 371; *Dodd* v. *Burchell*, 1 H. & C. 112; *Myers* v. *Gimmel*, 10 Barb. 537; *Palmer* v. *Wetmore*, 2 Sandf. Sup. C. R. 316; *Collier* v. *Pierce*, 7 Gray, 18.

In *Haverstick* v. *Sipe* the court hold, that the grant of an easement for light and air is not implied from the fact that such a privilege has been long enjoyed; and that a contract for such privilege is not implied on the sale of a house and lot, from the character of improvements on the lot sold, and the adjoining lots. The court say: "There is a sort of necessity for such an implication relative to other apparent easements, such as roads and alleys, in order to account for a use of another man's land that would otherwise be a wrongful encroachment: and the implication is easily framed or defined, for it appears on the ground. But how can we define an easement for light and air by implication, without arresting all change in the style of buildings, all enjoyment of a man's house, according to the demands of a growing or improving family? A purchaser of a house in a crowded town never supposes that his neighbor will have a right to prevent him from changing the form of it according to his taste."

We fully concur in the opinion thus expressed, and in the reasoning upon which it is based.

Judgment reversed, and cause remanded for a new trial.

Brinkerhoff, C. J., and Scott, White, and Day, JJ., concurred.[1]

EMERSON *v.* MOONEY.

Supreme Judicial Court of New Hampshire. 1870.

[*Reported* 50 *N. H.* 315.]

Bellows, C. J.[2] The bill charges that the plaintiff had dug a well on the land of Joseph Mooney, and had laid an aqueduct from it through land of Ichabod Rawlings to the highway, and from thence to

[1] See *accord.*, *Keats* v. *Hunt*, 115 Mass. 204. *Contra* are *Seipden* v. *Thebidoux*, 38 N. J. Eq. 318; *James* v. *Jenkins*, 34 Md. 1. Cf. *Remington's Appeal*, 94 Pa. 147, 153, where it is said that an easement of light may be raised by actual necessity.

[2] The opinion only is given.

plaintiff's buildings, to Dudley Barker's shed, and to a dwelling-house recently occupied by Smith Emerson; that afterwards, on January 20th, 1844, the plaintiff and said Joseph Mooney made an agreement by which the said Mooney was to purchase said well and aqueduct of the plaintiff, and pay him the cost of constructing it, deducting one hundred dollars from the cost, and the plaintiff reserving the take-outs or branches to Dudley Barker's shed, and reserving water for plaintiff's house, barn, and store, and the Smith Emerson house, forever; and that on the same day the plaintiff, by deed, a copy of which is made part of the bill, conveyed to said Mooney all his right, title and interest in and unto the aqueduct well, and aqueduct leading therefrom, to the places before mentioned, "excepting the branch taken and carried to Dudley Barker's shed, agreeably to his deed from me dated November 9th, A. D. 1843, and also my right of using all necessary water at my take-outs, viz., house, store, and the house where Smith Emerson now lives, to be used in a prudent and faithful manner; and the said William will not suffer any unnecessary waste of water conducted by means aforesaid to his said places of take-outs; and the said Joseph Mooney hereby guarantees to the said William Emerson sufficient quantity of water for all necessary purposes at said places." And the bill alleges that afterwards, on April 2, 1845, and June, 1849, the said Joseph Mooney conveyed to the said Charles C. Mooney, one of these defendants, his right and interest in said aqueduct and well. That since said January 20th, 1844, branches have been laid from said aqueduct to the houses now occupied by the several defendants, and the places where the water from said branches is discharged is lower than where it is discharged or drawn at the house, barn, and store of the plaintiff, and at the Smith Emerson house.

That at certain seasons of the year there is not a full and sufficient supply of water for the several persons who claim a right to draw from said aqueduct; and the places of discharge at the premises of the several defendants being lower than those of the plaintiff at his house, barn, and store, and at the Smith Emerson house, he, and the persons occupying the Smith Emerson house, have been and are in a great measure deprived of the needful supply of water, and of the supply to which they are rightfully entitled by the agreement made with Joseph Mooney, and, as he claims, to which he is entitled by virtue of his right under the exception in his said deed to said Mooney.

The prayer is for a perpetual injunction against drawing the water to the prejudice of the plaintiff, his heirs and assigns, at his places of discharge at said house, barn, and store, and the Smith Emerson house; and that the deed aforesaid may be reformed if it does not conform to the agreement; and for general relief.

The answer alleges that the defendants do not know whether the plaintiff dug the well at his sole expense, or whether it was dug by the plaintiff and said Joseph Mooney, and denies that it was dug at plaintiff's sole expense. They admit the conveyance, and deny any other

agreement than what is embodied in the deed. They admit the conveyance from Joseph Mooney to Charles C. Mooney, and that, since the conveyance of January 20, 1844, branches have been laid down from said aqueduct to the houses and premises now occupied by the several defendants; but deny that the places where the water from said branches is discharged are lower than where the plaintiff has a right to have it discharged on his premises and at the Smith Emerson house: and say that if the plaintiff, or the occupier of the Smith Emerson house, has been in any measure deprived of a needful supply of water, it has been caused by their own mismanagement, and not by the fault of any of the defendants.

A referee or master having been appointed, makes report that since the fall of 1864 the plaintiff has not received the quantity of water to which he was entitled by his deed from Joseph Mooney of January 20th, 1844, — evidently meaning his deed *to* Joseph Mooney; that the failure of the plaintiff to receive a supply of water is attributable to some of the defendants who are named, six of them in all; — and the referee reports the changes to be made by those defendants to secure to the plaintiff the supply of water to which he is entitled.

The defendants' counsel does not contest the right of the plaintiff to a decree restricting the defendants in the use of the water according to the referee's report, but contends that this restriction should extend no farther than during the life of the plaintiff, upon the ground that, as the exception in the deed was without words of inheritance, the plaintiff had only a life estate in the subject of the exception.

We think, however, that the estate of the plaintiff is not so limited. There are authorities, and those of a highly respectable character, which hold otherwise.

In 2 Washb. on Real Property, 641, it is laid down that the same rule which requires words of inheritance in the case of a grant, applies equally to an exception, and for this is cited Shepp. Touch. 100; and the same doctrine is held in *Curtis* v. *Gardner*, 13 Met. 461, and also in *Jamaica Pond Aqueduct Corporation* v. *Chandler et al.*, 9 Allen, 159, 170. In the latter case Bigelow, C. J., held that an exception in these terms, "to improve and cultivate and take the emoluments to his own use" of such part of the land conveyed as the grantors did not flow or cover with water, was a personal right excepted out of the grant in behalf of the grantor only, and not for his heirs or assigns; and he cites for this Shepp. Touch. 100, and *Curtis* v. *Gardner*, before mentioned.

It might be plausibly urged that from the terms of the exception it was the intent of the parties to limit the use of the land not flowed to the grantor personally, and that this was the view taken by the court in that case; but however this may be, we think no such doctrine has been recognized in this State as is maintained by these authorities.

It is apparent that the doctrine recognized by the authorities cited

is based largely upon the authority of Shepp. Touch. 100, and as it originally stood it would seem to favor the rule for which it is cited, although it is inconsistent with another part of the same paragraph; as corrected, however, by Mr. Preston, the very learned and competent editor of that work, the doctrine of the Touchstone is, that "if the thing be excepted indefinitely, without saying for the life of the grantor, nor how long, it shall be taken to be an exception during the estate." This, in fact, is the very language of the Touchstone; and the correction by Preston is in bringing into harmony with it the language of the preceding sentence. And this correction also brings the passage into harmony with the case in Dyer, page 264, which is cited by Preston as the authority for the doctrine of the Touchstone as corrected by him. In that case the husband and wife were the termors of a messuage in Fleet Street called the Three Conies for a long term of years. The husband alone made a lease thereof for part of the term of years in these words, to wit, The messuage or tenement in Fleet Street called the Three Conies, with all the chambers, cellars, shops, &c., excepting and reserving to the husband by his name the shops, for his own proper and sole use and occupation. The husband dying during the term, and the wife surviving, entered upon the lessee in the shops, and was re-ousted, and thereupon she brought ejectment; and it was held that it appears by express provision before, and the shops were leased generally, and such reservation and exception is only special and temporary, to wit, during the occupation of the lessor himself, according to 3 B. 6, § 3, where trees were not merely excepted from the lease, but that it should be lawful for the lessor to cut down, give away, and sell the trees; and it was noticed that the exception and reservation was made to the husband, the lessor, by his name, to wit, J. Hornby only, without saying to his executors and assigns; and it was also noticed that the exception, being of the shops, is of all the shops, which is simply contrary to the premises of the lease itself, and so a void exception.

It is obvious that the decision here went upon the ground that the exception of the shops was for the personal and special use of the husband alone, and was therefore temporary and to end with his life, and was not based upon the absence of words of limitation; and so it was in the case cited from 3 B. 6, § 3. This case, then, is no authority for the rule that an exception in a grant without words of inheritance gives only a life estate. That this cannot be the rule is manifest from a consideration of the nature of an exception. It is defined to be a clause in a deed whereby the grantor, lessor, &c., doth except somewhat out of that which he had granted before, or which was comprised within the generality of the terms of the deed — Shepp. Touchstone, 77; or, as stated in Co. Lit. 47 a, it is ever a part of the thing granted, and of a thing *in esse*. It differs from a reservation, which is always of a thing *not in esse*, but merely created or reserved out of the thing granted or demised; Co. Lit. 47 a, as a rent, a way, and the like.

In the case of an exception, the thing excepted is exempted and does not pass by the grant, neither is it parcel of the thing granted; as, if a manor be granted except one acre thereof, hereby, in judgment of law, that acre is severed from the manor. Shepp. Touchstone, 79. So it is laid down by Chancellor Kent, 4 vol. of his Commentaries, "that if the exception be valid, the thing excepted remains with the grantor with the like force and effect as if no grant had been made;" and so is 2 Washb. on Real Property, 640. The exception does not in fact create an estate in the grantor, but, in respect to the parcel excepted, leaves the title in him as it was before the grant; and there can be no substantial difference in effect between a conveyance which describes in general terms the whole of a tract of land, and then excepts a part by definite boundaries, and a conveyance which describes the tract in the first instance so as to exclude the parcel not intended to be granted. In neither case can it be said that such parcel was granted. It, in fact, has always remained with the grantor. Where the title is created by the grant, it is well settled, as a general rule, that words of inheritance are necessary to confer a fee. The rule is of feudal origin, and was based upon the idea that the personal abilities of the donee or grantee were the only inducement to the gift; and therefore his estate in the land extended only to his own person, and subsisted no longer than his own life, unless the donor, by express provision in the grant, gave it a longer continuance, and extended it to his heirs. 2 Blk. Com. 108. The rule, however, has not been fully suited to the condition of a more commercial age, and it has been softened by many exceptions, some of which are stated in Co. Lit. 9, 10, and 2 Blk. Com. 108–9. In the case of devises, an exception was established at an early period, and it was only necessary that the purpose to give a fee should be disclosed in some terms without requiring the use of the word heirs. Co. Lit. 9; 2 Blk. Com. 108–9.

In respect to an exception, we find no adjudged case in this State requiring words of inheritance to make a fee in the grantor, and we think that there has been no understanding in the profession that such a rule existed here; and unless we felt bound, by a decided preponderance of authority, we should not be inclined to adopt a rule which would be likely to unsettle many titles, and at the same time is not, as we think, based upon any sound principle. Nor do we find the weight of authority in favor of such a rule. In *Wheeler* v. *Brown*, 46 Penn. St. Rep. 197, there was an exception of the coal in a tract of land, granted with a right of ingress and egress to take it away, without words of inheritance. The court held that the grantor at the time of the grant held the coal in fee simple, and because it did not pass by the conveyance he continued to hold it in fee; that the word heirs was not necessary in the reservation, for an estate of inheritance existed already in the grantor, and, unimpaired by the conveyance, it descended to his heirs at his death; and so of the right of way, which was expressly annexed to the estate in the coal, and was saved by the exception.

A similar opinion is given in *Kicker* v. *Wood*, 30 Vt. 242; of a similar character is *Smith* v. *Ladd*, 41 Maine, 314, and *Winthrop* v. *Fairbanks*, 41 Maine, 307. This last case was a conveyance of land, "reserving forever for myself the privilege of passing with teams and cattle across the same in suitable places to land I own south of the premises," but it was not in terms to him or to his heirs and assigns. The court, however, held that it might be regarded as an exception, and confers the benefit of an exception to the grantor, his heirs and assigns; and that the way would be appurtenant to the lands for which it was reserved, and that no words of inheritance were necessary. In this case the grantor had died, and the dominant tenement was held by a grantee of his heirs. In *Bowen et al.* v. *Connor*, 6 Cush. 132, it was held that a reservation forever of a right of way over a street to be made by the defendant inured to the benefit of the grantor and his assigns, as owners of the back lot.

Upon these views we think the exception must inure to the benefit of the plaintiff and his heirs and assigns; and this we think accords with the intent of the parties, to be gathered from the terms of the deed. Unless, then, some other objection exists, the plaintiff is entitled to a decree against the six defendants named in the referee's report in accordance with his report; and as to the rest, they not having been shown to have interfered with the enjoyment of the plaintiff's right, the bill is to be dismissed.

The title of the plaintiff is not questioned by defendants; and it would seem that by the guaranty of the grantee, which became binding by the acceptance of the deed and the title under it, he would be estopped to deny the plaintiff's title, and so would his assigns with notice express or implied. *Newell* v. *Hill*, 2 Met. 180; *Goodwin et al.* v. *Gilbert et al.*, 9 Mass. 510.

S. M. Wheeler, for plaintiff.

Ira A. Eastman, for defendants.

BUTTERWORTH *v.* CRAWFORD.

COURT OF APPEALS OF NEW YORK. 1871.

[*Reported* 46 *N. Y.* 349.]

APPEAL from judgment of the General Term of the Court of Common Pleas, for the City and County of New York, affirming judgment entered upon the report of a referee.

The facts of this case, as found by the referee, are as follows: Henry Vulkening in 1864 owned two houses adjoining each other on the north side of Forty-sixth Street, in the city of New York, known as Nos. 83 and 85 West Forty-sixth Street. While such owner, he dug and formed a vault, extending partly into the yard of each house, and constructed

a drain from such vault, running through the lot of house No. 85, to the sewer in Forty-sixth Street. He then built a division fence between the yards of the two houses, extending from the rear of the houses to the rear of the lots, which fence was upon the division line, and crossed the vault in the centre. He constructed an outhouse on either side of such division fence, over the vault for said house respectively, the roof of such outhouse extending a few inches above the fence.

After constructing such vault and outhouses, on the 11th day of December, 1865, he conveyed the house and lot No. 85 West Forty-sixth Street, to the defendant in this action, by full covenant warrantee deed.

The defendant, immediately on the receipt of such deed, took possession of the said premises. Thereafter, on the 26th day of January, 1866, Vulkening conveyed said house, known as No. 83 West Forty-sixth Street, to the plaintiff.

In the summer of 1866, the defendant built a privy on his premises No. 85 West Forty-sixth Street, about twelve feet farther towards the rear of his lot, and extended the drain to the vault of such privy, and then cut off the connection between that portion of the vault on the plaintiff's lot and the said drain.

The defendant upon the trial offered to show, that there was nothing in the appearance of the premises at the time he bought, to give notice that the privy was drained through his lot. This was refused by the referee, and the defendant's counsel excepted.

The defendant's counsel also offered to prove, that the defendant had no notice when he bought, that the privy was drained through his lot. This was refused by the referee, and the defendant's counsel duly excepted.

The referee, as conclusions of law, decided: That the defendant had no right to cut off or obstruct the communication, from that part of the vault on the plaintiff's lot, through the drain on the defendant's premises to the sewer in the street.

That the plaintiff was entitled to judgment, restraining the defendant from continuing such obstruction, and requiring the defendant to open such drain, and to restore the same to the condition it was in at the time of the said conveyance to the plaintiff.

N. Smith, for appellant.

H. R. Selden, for respondent.

RAPALLO, J. We have come to the conclusion, that the drain in controversy, did not constitute an *apparent* servitude or easement, and that consequently the case does not present the question so fully argued before us, whether when a dominant and servient tenement are owned by the same person, and he makes a conveyance of the servient tenement first, with covenants of warranty, and against encumbrances, and without the express reservation of any easement, such conveyance will preclude him or his assigns, from afterward asserting in favor of the dominant tenement, which he retains, the benefit of the easement in

the premises so conveyed. We therefore refrain from expressing an opinion upon that point.

All the authorities cited on the argument, by the learned counsel for the respective parties, concur in holding, that the rule of law which creates an easement on the severance of two tenements or heritages, by the sale of one of them, is confined to cases, where an *apparent sign* of servitude exists on the part of one of them in favor of the other; or as expressed in some of the authorities, *where the marks of the burden are open and visible.*

Unless, therefore, the servitude be open and visible, or at least, unless there be some apparent mark or sign, which would indicate its existence to one reasonably familiar with the subject, on an inspection of the premises, the rule has no application.

There was nothing in the situation or appearance of the premises, to indicate that there was any drain from the privies in question. Drains are not a necessary accompaniment of privies constructed as these were. In cities, municipal regulations provide for their being cleansed by licensed public scavengers, and this practice is frequently brought to the notice of the inhabitants in a very obvious manner. No evidence was introduced to show that drains from them were usual in the locality in question. But had such evidence been given, it does not appear, that there was anything to indicate, that the privy of the neighboring house was drained through the lot sold to the defendant.

In the case of *Pyer* v. *Carter*, 1 Hurl. & Nor. 916, which was much relied upon on the argument, and in the opinion of the learned court below, the dominant and servient tenement had originally been one house. This house had been divided into two parts. The drainage was of the water which fell upon the roof, and it may well be, that the situation and arrangement of the building were such as to indicate, that some drain necessarily existed as an appurtenant to the house, and that upon the division of the house into two parts, that drain became common, and afforded drainage for both of the parts through one of them.

Such seems to have been the fact; for the court says, in rendering judgment, that "the defendant must have known, or ought to have known, that some drainage existed, and if he had inquired, would have known of this drain."

That decision recognizes the necessity of establishing, that the servitude is apparent, or that there is an apparent mark or sign of it, and seems to be based on the fact, that the situation and construction of the premises afforded such a sign.

In Washburn on Easements (2d ed., page 68), the learned author, after reviewing the cases on this subject, states that he considers the doctrine of *Pyer* v. *Carter* confined to cases, where a drain is necessary to both houses, and the owner makes a common drain for both; and this arrangement is apparent and obvious to an observer.

If *Pyer* v. *Carter* goes farther than that, or, at all events, if it

applies to cases where there is no apparent mark or sign of the drain, it is not in accordance with the current of the authorities.

The bearing of that case upon the question, whether the alleged easement was one of necessity, upon the point as to the order in which the tenements were sold, and upon the other questions, which were argued before us with so much learning and ability, need not be now considered, as we do not propose at this time to decide those questions; and for the same reason, we forbear reviewing the numerous other authorities to which we have been referred, basing our decision upon the single ground, that the servitude claimed was not apparent.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur. *Judgment accordingly.*

ASHCROFT *v.* EASTERN R. R. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1879.

[*Reported* 126 *Mass.* 196.]

BILL in equity, filed June 13, 1878, alleging that, on October 26, 1837, John Lovejoy conveyed to the defendant a parcel of land in Lynn, over which its railroad has been located, consisting of a strip twenty-eight feet in width; that said parcel has ever since been owned and used by the defendant; that, by the terms of the deed, Lovejoy created and reserved, for the benefit of his adjoining land, an easement in the land, namely, the right to receive water from a spring by aqueduct logs, through a culvert across the land conveyed to the defendant, on to the adjoining land which was then owned by Lovejoy; that the plaintiff by mesne conveyances, had become the owner of said adjoining land and buildings of Lovejoy, for the benefit of which the easement was reserved, which easement was conveyed with the land; that Lovejoy and his grantees, including the plaintiff, have used, without interruption or objection on the part of the defendant, the culvert and aqueduct for more than twenty years prior to the acts of the defendant hereinafter complained of; that the premises belonging to the plaintiff have been used for many years for morocco and tanning business, requiring a large supply of pure water, which, prior to the acts hereinafter complained of, has always been supplied by the aqueduct running through the culvert under the railroad; that in August, 1870, the defendant caused the culvert, under which the aqueduct logs were laid, to be filled with rocks and other obstructions, the weight and force of which crushed the logs, so that the water, which should have been conducted by them into and upon the premises of the plaintiff, overflowed, wasted and flooded said premises, and caused the tenant thereof to leave; that this overflow of water was adjudged by the Board of Health of Lynn to be a public nuisance, in consequence of which the plaintiff

was obliged to lay a drain to conduct away the water at great expense; that while these obstructions were being put in, and since then, the plaintiff frequently protested to the defendant against its action, and has repeatedly notified the defendant of the interference with his easement and injury to his land, and has constantly demanded of it the restoration of his rights; but it has wholly neglected and refused to remove the obstructions and restore his rights; that, in consequence of these acts of the defendant, the plaintiff is wholly deprived of the use and enjoyment of the aqueduct and the water therefrom, and has been prevented from carrying on his business; that the defendant is insolvent and unable to pay its debts in full, and all of its property is mortgaged to creditors for a much larger sum than its value, although the defendant is still in the legal possession of the property, and it has no property which can be come at to be attached or taken on execution in an action at law; that the acts of the defendant are an appropriation of a privilege, right and easement appurtenant to the plaintiff's land, of a continuous and permanent nature; and that the plaintiff has not a plain, adequate, and complete remedy at law.

The prayer of the bill was that the defendant might be ordered to remove the obstructions, and to restore the aqueduct to its usual and former condition; that it might be decreed to pay to the plaintiff a sum of money sufficient to compensate him for the damage done; that it might be perpetually restrained from obstructing or in any way interfering with the plaintiff's aqueduct; and for further relief.

The defendant filed a plea alleging that the reservation in the deed of John Lovejoy to the defendant, dated October 26, 1837, was in the words following, and not otherwise: "Reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company; which culvert shall cross the railroad at right angles with the southeasterly line of John Alley, 3d's land, seventy-four feet west of the northeasterly line of my land, measuring on the centre of the railroad;" and also alleging that John Lovejoy died on September 12, 1876.

Hearing before *Ames*, J., upon the bill and plea, who reserved the question of the sufficiency of the plea for the determination of the full court.

J. P. Treadwell, for the plaintiff.

R. Olney, for the defendant.

Morton, J. The plaintiff's right to maintain this suit depends upon the construction of the clause in the deed recited in the defendant's plea.

We are of opinion that this clause must operate as a reservation, or by way of implied grant. The operation of an exception in a deed is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant; and whatever is thus excluded remains in him as of his former right or title, because it

is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him. Shep. Touchst. 80. *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290.

The clause we are considering does not merely reserve to Lovejoy a right of way and of maintaining aqueduct logs through the land granted. The privilege which the parties intended should vest in him was the right of passing and repassing, and of maintaining his aqueduct logs through a culvert to be built and kept in repair by the grantee. The provision that the grantee shall build and keep in repair the culvert is an essential part of the grant, and clearly indicates that the intention of the parties was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception.

It is well settled that, generally, the same rules of construction apply to a reservation or implied grant as to an express grant. In this case, the words used were, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert." This gave only an estate for life to Lovejoy. To create an estate of inheritance by deed to an individual, the land must be conveyed to the grantee and his heirs, and these necessary words of limitation cannot be supplied by other words of perpetuity. As stated by Wilde, J., in *Curtis* v. *Gardner*, 13 Met. 457, "a grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life." See also *Dennis* v. *Wilson*, 107 Mass. 591.

It is not necessary to decide whether the easement created by the reservation was appurtenant to the remaining land of Lovejoy. Assuming it to have been so, this could not have the effect to extend its duration. Lovejoy might assign it, if appurtenant, by a deed of the remaining land, but it would expire with his life, whether assigned or retained by him.

It follows from these considerations, that this bill cannot be maintained. Lovejoy having died before this suit was commenced, the easement had ceased to exist, and the plaintiff is not entitled to the relief prayed for in the bill. The defendant's plea, therefore, is sufficient.

Bill dismissed.[1]

[1] See *Dennis* v. *Wilson*, 107 Mass. 591; *Bean* v. *French*, 140 Mass. 229.

HABENDUM. On the *habendum* see *Anon.*, Moore, 43, pl. 133; *Dearse's Case*, Cro. El. 25; *Kirkman and Reignold's Case*, 2 Leon. 1; *Windsmore* v. *Hubbard*, Cro. El. 58; *Tarrannah* v. *Cooper*, Cro. Jac. 476; *Altham's Case*, 8 Co. 148 a, 154 b; *Goodtitle* v. *Gibbs*, 5 B. & C. 709; *Doe* d. *Timmis* v. *Steele*, 4 Q. B. 663; *Hafner* v. *Irwin*, 4 Dev. & B. 433; *Tyler* v. *Moore*, 42 Pa. 374; Co. Lit. 21 a, 299 a; Elphinstone, Interp. of Deeds, c. 14, Rule 66.

CHAPTER VII.

COVENANTS FOR TITLE.[1]

LEWES v. RIDGE.

COMMON PLEAS. 1601.

[*Reported Cro. El.* 863.]

COVENANT. The defendant, being seised of land in fee, let it for life, remainder for life, rendering rent. He afterwards acknowleged a Statute; and after that by indenture bargained and sold the reversion, and covenanted with the bargainee, his heirs, and assigns, that it should be discharged within two years of all Statutes, charges, and encumbrances, excepting the estates for life. The Statute is extended, and thereupon this reversion and rent was extended. The bargainee grants this reversion to the plaintiff, who, for not discharging of this Statute, brings covenant. And all this matter being disclosed by the count, it was thereupon demurred. The question principally moved was, whether the plaintiff, as assignee, shall have benefit of this covenant made to the bargainee by the common law, or by the 32 Hen. 8, c. 34. — But because the covenant was broken before the plaintiff's purchase, the land being then in extent, and so a thing in action, which could not be transferred over, it was adjudged for the defendant that the action was not maintainable against him.

And here the court held clearly, that the 32 Hen. 8, c. 34, doth not extend to covenants upon estates in fee or in tail, but only upon leases made for life or for years, and therefore this assignee was out of the Statute. But for the other matter principally it was adjudged *ut supra*.

MIDDLEMORE v. GOODALE.

KING'S BENCH. 1639.

[*Reported Cro. Car.* 503.]

COVENANT. Whereas the defendant by indenture enfeoffed J. S. of such lands, and covenanted for himself and his heirs with the feoffee, his heirs, and assigns, to make further assurance upon request; which

[1] The only matter with reference to covenants for title here considered is their running with the land. On this, as on all other questions touching these covenants, the student should consult the admirable treatise of the late Mr. William Henry Rawle.

lands J. S. conveyed to the plaintiff, who brings this action, because the defendant did not levy a fine upon the plaintiff's request.

The defendant pleaded release from the said J. S. with whom the first covenant was made, and it was dated after the commencement of this suit; and thereupon

The plaintiff demurred.

And all the court agreed, that the covenant goes with the land, and that the assignee at the common law, or at leastwise by the Statute, shall have the benefit thereof.

Secondly, they held, that although the breach was in the time of the assignee, yet if the release had been by the covenantee (who is a party to the deed, and from whom the plaintiff derives) before any breach, or before the suit commenced, it had been a good bar to the assignee from bringing this writ of covenant. But the breach of the covenant being in the time of the assignee, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee cannot release this action wherein the assignee is interested. Whereupon rule was given, that judgment should be entered for the plaintiff, unless cause was shown to the contrary by such a day.[1]

LUCY *v.* LEVINGTON.

King's Bench. 1671.

[*Reported* 2 *Lev.* 26.]

Covenant, and declares, that Levington sold to Luke Lucy, the plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy the same against him and Sir Peter Vanlore, their heirs and assigns, and all claiming under them; and assigns for breach, that Croke, claiming under Vanlore, ejected him. The defendant pleaded, that at the time of the covenant he was seised of an indefeasible title, and that by a subsequent Act of Parliament, reciting, that Sir Peter Vanlore had settled this estate upon the Lady Mary Powell, and that certain persons had unduly procured her to levy a fine, 't was enacted, that this fine should be void, and that all persons might enter as if no fine had been levied; and that by force of this fine *et non aliter*, the defendant was seised, and sold and made this covenant; and that after the Act, Croke, claiming by title derived from the Lady Mary Powell, by the settlement of Vanlore, by virtue of the said Act of Parliament, entered and ousted him, upon which the plaintiff demurred. And for the defendant 't was argued, First, that the covenant was with Lucy, his heirs and assigns, touching an estate of inheritance; therefore the action ought to be brought by the heir or assignee, whose loss it is, and not by the executor. To which 't was

[1] See *Crooker* v. *Jewell*, 29 Me. 527 (1849).

answered and resolved by the court. *That the eviction being to the testator*, he cannot have an heir or assignee of this land; and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator. 2. 'T was argued, that the title on the covenant being good at the time of the making, and the title upon which the evidence depends, created by subsequent Act of Parliament: here is no breach, 9 Co. Rep. 106, 107, *Dame Gresham's Case*. To which 't was answered and resolved by HALE and RAINSFORD, that the Act does not make a new title, but removes the obstruction that kept off the old title; and they said, that doubtless Sir Peter Vanlore was named in the covenant, for the purpose that they might be secured in case this fine thus unduly obtained should be avoided. But TWYSDEN being of a contrary opinion, a writ of error was brought immediately. *Sed quid inde venit nescio*. *Levinz* of counsel for the defendant, *Weston* for the plaintiff.

KINGDON *v.* NOTTLE.

KING'S BENCH. 1813.

[*Reported* 1 *M. & S.* 355.]

THIS action was brought by the plaintiff, as executrix of Richard Kingdon; and the declaration stated, that by indentures of lease and release of the 11th and 12th of May, 1780, the defendant conveyed to R. Kingdon in fee a 4th part of certain lands therein particularly described, with a proviso for redemption upon payment of £450; and that the defendant covenanted for himself, his heirs, executors, and administrators, with R. Kingdon, that he the defendant was at the time of the execution of the indenture seised of and in the premises of a good and indefeasible estate of inheritance in fee simple: and that he had good right to convey the same to R. Kingdon and his heirs: and further, that the defendant would from time to time, upon every reasonable request of R. Kingdon, his heirs or assigns, but at the defendant's costs, execute any further conveyance for the purpose of assuring and confirming the premises to R. Kingdon, *his heirs and assigns*; and then the following breaches were assigned: first, that the defendant was not seised in fee at the time of the execution of the indenture: secondly, that the defendant had not at that time good right to convey: lastly, that the plaintiff, as executrix after the death of R. Kingdon, made a reasonable request to the defendant to execute an indenture between the defendant of the first part, the plaintiff of the second part, and Samuel Anethe of the third part, intended to be a release of the premises for suffering a common recovery for the better assuring and confirming the premises to the uses mentioned in the deed: and tendered the same to the defendant for execution, but the defendant refused to

execute. The defendant demurred to the first and second breaches, assigning for causes that they are assigned too generally, and are not sufficiently precise and certain, and that it does not appear that R. Kingdon sustained or could have sustained any damage by the said breaches of covenant, or either of them, nor that he was at any time interrupted or disturbed in his enjoyment of the premises conveyed to him by the defendant; nor that the said Elizabeth has or claims any interest in the premises, or that she is heir at law, or assignee of the same, or any part thereof. He demurred also to the last breach, assigning for causes, that it does not appear that the said Elizabeth hath or claims to have any interest in the premises, as assignee or otherwise, of R. Kingdon, nor to what person, or for whose use the deed of release was intended to inure, or why or for what reason Samuel Anstice was made a party thereto, nor that the said deed of release was a reasonable conveyance or assurance in that behalf: and also for that the said last-mentioned breach of covenant cannot by law be joined in the same declaration with the other breaches of covenant in the said declaration assigned: and also for that the said declaration as to the said breach of covenant lastly assigned is in various other respects insufficient, informal, and defective. Joinder.

Gifford, in support of the demurrer.

Bayly, contra.

Lord Ellenborough, C. J. This is a case in which a person may have formed his opinion from what is to be found in a book of very excellent authority, I allude to Comyns's Digest (Com. Dig. tit. Covenant, B. 1), in which it is laid down generally that if a man covenant with B. upon a grant or conveyance of the inheritance, his executor may have covenant for damages upon a breach committed in the lifetime of his testator. But when that position comes to be compared with *Lucy* v. *Levington*, which is the authority there cited in support of it, it will be found not to be borne out by that case in its generality; for in that case there was an eviction in the lifetime of the testator, and therefore the damages in respect of such eviction, for which the action was then brought, were properly the subject of suit and recovery by the executor; and nothing descended to the heir. But in this case there is no other damage than such as arises from a breach of the defendant's covenant that he had a good title, and there is a difficulty in admitting that the executrix can recover at all, without also allowing her to recover to the full amount of the damages for such defect of title; and in that case a recovery by her would bar the heir; for I apprehend the heir could not afterwards maintain another action upon the same breach. Had the breach here been assigned specially with a view to compensation for a damage sustained in the lifetime of the testator, and so as to have left a subject of suit entire to the heir, this action might have gone clear of the difficulty, because then it would not operate as a bar to the heir; but framed as it now is, it seems to me that it would operate as a bar to his action. It is certainly a new point; and if I thought that more

authorities could be found than what have been cited, which, however, from the industry of the gentlemen who have argued the case, is not very probable, I should have paused. But what has been cited from Co. Lit. and the other authorities, that the executor of a person who died seised of a rent could not maintain an action to recover the arrears incurred in the lifetime of his testator, inasmuch as he could not represent his testator as to any contracts relating to the freehold and inheritance, is in a great degree an authority to show that in the present case the executrix does not stand in a situation to take advantage of this breach of covenant. Therefore on the principle of what is there laid down, and in the absence of any damage to the testator, which, if recovered, would properly form a part of his personal assets, I do not know how to say that this action is maintainable.

Le Blanc, J. This action is brought by the executrix to increase the personal estate of the testator. The difficulty arises from its being assigned as a breach of covenant in the lifetime of the testator. The breach assigned is in not having a good title. But how is that breach shown to have been a damage to the testator? It is not alleged that the estate was thereby prejudiced, during the lifetime of the testator: and if after his decease any damage accrued, that would be a matter which concerns the heir. The distinction which attends real and personal covenants with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor. Now this is a covenant on which after one breach has been assigned and a recovery had thereon, the party cannot again recover. It is not like a covenant for not repairing, for a breach of which damages may be recovered now, and again hereafter, and so *toties quoties;* although even in that case there is always a difficulty in apportioning the damages. But here no breach from which a damage accrued to the testator is stated at all. Yet the action is brought to increase the personal estate, which belongs to the executor; when the estate itself, such as it is, has come to the heir.

Bayley, J. The testator might have sued in his lifetime; but having forborne to sue, the covenant real and the right of suit thereon, devolved with the estate upon the heir. If this were not so, and the executrix was permitted to take advantage of this breach of covenant, she would be recovering damages to be afterwards distributed as personal assets, for that which is really a damage to the heir alone; and yet such recovery would be a complete bar to any action which the heir might bring. The case of *Lucy* v. *Levington* struck me as a strong authority for the defendant: because in that case it appears there was an actual damage accruing to the testator by the eviction, whereby he was deprived of the rents and profits during his life, and of course the personal estate was so far damnified. There, as I have before observed,

if the executor could not have sued, no other person could, because the testator having been evicted, there could be no heir of the land, and that was given as a reason why the action was holden to be maintainable.

Judgment for the defendant.

KING *v.* JONES.

COMMON PLEAS. 1814.

[*Reported* 5 *Taunt.* 418.]

HEATH, J.[1] This is a motion in arrest of judgment. This action appears to have been brought by the plaintiff as heir of his father, against the defendant as executor of Richard Griffith, upon the covenant of the testator; and the pleadings disclose these facts: by lease and release of the 6th and 7th of October, 1794, T. Worge, and Griffith and his wife, conveyed certain premises to J. King; and Griffith covenanted with J. King that he and Mary his wife would do all reasonable acts for the further conveyance of the premises. The pleadings further disclose, that there was a request made by John King the ancestor, to Griffith, to levy a fine: that no fine was levied: that J. King the ancestor died: and the premises descended to the plaintiff as the heir of John King, and that the plaintiff has since been evicted: and the question is, whether the plaintiff can sustain this action. It was admitted that this is a covenant which runs with the land. Under this covenant the heir might call for further assurances, even to levy a fine: he certainly might have called for the removal of a judgment, or other encumbrances. It appears that John King the ancestor was a willing purchaser: he paid his purchase-money, relying on the vendor's covenant: he required him to perform it, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do, until the ultimate damage was sustained; for otherwise he could not have recovered the whole value: the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty), in preference to the executor. These are the principles of the case; how are the authorities? There are few old authorities directly in point, but there is one recent case that is directly applicable. The old authorities are, Fitzherbert, N. B. Writ of Covenant, p. 341 C. "If a man make a covenant by deed to another, and his heirs, to enfeoff him and his heirs of the manor of D., &c., now, if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of covenant upon that deed:" he cites the *Case of Sir Anthony Cook*, Dy. 337; also reported in Anders. 53. [Here his Lordship read the case.] The recent decision is that of *Kingdon* v. *Nottle*, last Easter Term, 1

[1] Only the opinion is given.

Maule & Selwyn, 355, wherein the Court of King's Bench held that the executor could not recover upon a breach of the defendant's covenant with the testator, that he, the defendant, had a good title to convey, the testator having sustained no damage in his lifetime: therefore it follows that the heir might so recover. The court there follow the doctrine of *Lucy* v. *Levington*, and they advert to the circumstance which differs that case from this, that there the ultimate damage was sustained in the time of the ancestor, and therefore the land did not descend to the heir; consequently the covenant, which runs with the land, did not descend to the heir. The consequence is, that this judgment ought not to be arrested, and that the rule must be discharged. *Rule discharged.*

Sellon, Serjt., for the plaintiff.

Shepherd and *Blossett*, Serjts., for defendant.

KINGDON *v.* NOTTLE.

King's Bench. 1815.

[*Reported* 4 *M. & S.* 53.]

Covenant by the plaintiff as devisee of Richard Kingdon; and the plaintiff declares that by indentures of lease and release of the 11th and 12th of May, 1780, the defendant conveyed to R. Kingdon in fee a fourth part of certain lands therein particularly described, with a proviso for redemption upon payment of £450; and that the defendant covenanted for himself, his heirs, executors, and administrators, with R. Kingdon, that he the defendant was at the time of the execution of the indenture seised of and in the premises of a good and indefeasible estate of inheritance in fee simple; and that he had good right to convey the same to R. Kingdon and his heirs; and then the plaintiff avers that R. Kingdon, on the 3d of May, 1791, duly made his will, &c., and thereby devised the same premises to her in fee, and died seised, and that she (the plaintiff) entered into the premises, and became and was and continually hath been possessed thereof, and seised of and entitled to all such estate and interest of and in the same as R. Kingdon had in his lifetime, and at the time of his death, and assigns for breach, 1st, that the defendant, at the time of the execution of the indenture, was not seised, &c.; 2dly, that he had not good right to convey to R. Kingdon and his heirs, &c. And so the plaintiff says, that by reason thereof the premises are of much less value, to wit, less by £2,000 to the plaintiff than they otherwise would be, and that she hath not been able to sell, and hath been prevented and hindered from selling the same, for so large a price or so beneficially and advantageously as she otherwise might have done. And so she saith that the defendant hath not kept his covenant so made with R. Kingdon, but to keep the same with R. Kingdon in his lifetime, and the plaintiff, since his death, hath wholly refused.

Demurrer assigning for cause, 1st, that it appears by the declaration that the supposed breaches of covenant therein assigned were committed in the lifetime of R. K., before the plaintiff had any estate or interest in the premises; and also, that it does not appear by the declaration that R. K. was at any time disturbed or interrupted in the enjoyment of the premises by the defendant or any other person, or sustained or could have sustained any damage by the same supposed breaches of covenant or either of them, and also for that it is not alleged that the plaintiff hath at any time since the death of R. K. been interrupted or disturbed in the enjoyment of the premises, or any part thereof, or hath sustained any damage from the supposed breaches of covenant or either of them; and also that it does not appear that any person hath refused to purchase the premises on account of the supposed breaches of covenant, and also that the allegations that the premises are of much less value than they otherwise would be, and that the plaintiff hath not been able to sell, and hath been prevented and hindered from selling the same for so large a price or so beneficially and advantageously as she otherwise might have done, are too general, and do not give the defendant sufficient notice of the supposed damage.

Joinder.

Gifford, in support of the demurrer.

Lord Ellenborough, C. J. The rule with respect to the executor's right to sue upon breaches of contract made with the testator was considered in the former case of *Kingdon* v. *Nottle* as subject to some qualification; and in a still more recent case, *Chamberlain* v. *Williamson*, 2 M. & S. 408, it was considered that he could only recover in respect of such breach as was a damage to the personal estate. But here the covenant passes with the land to the devisee, and has been broken in the time of the devisee; for so long as the defendant has not a good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's lifetime; but according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate.

Le Blanc, J. If the covenant is to cease with the breach of it, then if it be broken, and the covenantee die immediately after, the covenant will be gone; and yet the injury arising from the breach would accrue altogether to the devisee.

Dampier, J. This is a covenant which runs with the land: but if it may be broken but once, and ceases *eo instanti* that it is broken, how can it be a covenant which runs with the land?

Judgment for the plaintiff.

Bayly was to have argued for the plaintiff.

GREENBY *v.* WILCOCKS.

SUPREME COURT OF NEW YORK. 1806.

[*Reported* 2 *Johns.* 1.]

THIS was an action of *covenant*. The declaration set forth a deed, made the 30th August, 1792, between the defendant, of the one part, and Carlile Pollock, of the other part, by which the defendant conveyed to Pollock, certain lots of land, in the County of Cayuga. The deed contained the usual *covenants*, on the part of the grantor with the grantee, his *heirs* and *assigns*; namely, that the grantor was well seised in fee, &c., had power and right to grant and convey; that the grantee should quietly enjoy, free from encumbrances, &c., and a *warranty* against the grantor and his heirs, and all persons whomsoever. The declaration further stated, that Pollock entered, and was possessed of the premises; and afterwards, on the 17th July, 1793, he and his wife granted and conveyed one of the lots of land, to Abraham Hardenbergh, who entered, and was possessed thereof; and being so seised and possessed thereof, afterwards, on the 5th July, 1794, granted and conveyed the same lot to Kellogg, the intestate. The plaintiff then averred, that at the time of executing the deed to Pollock, the defendant "was not seised and possessed of any right, title, or interest whatsoever, of, and in the said last described lot of land, but the title to the same lot of land, was vested in one John H. Holland; nor had the defendant any lawful power or authority, to sell and convey the same as aforesaid; nor hath the defendant secured and defended the said Pollock, Hardenbergh, or Kellogg, or either of them or their assigns, or the plaintiffs, in the quiet possession of the said lot of land; but, on the contrary, the said Kellogg, afterwards, in his lifetime, to wit, on the 5th July, 1794, was expelled from, and dispossessed of, the said lot of land; of all which, the said defendant had notice, &c., and so the plaintiffs say, that though often requested, &c., the defendant hath not kept his said covenant, so made and entered into, with the said Pollock," &c.

To this declaration, the defendant *demurred*, and the plaintiffs joined in demurrer.

Hopkins, for the defendant.

Gold, for the plaintiffs.

SPENCER, J. The plaintiffs' right to judgment, must rest on the covenants of seisin, and power to sell and convey in fee simple. The eviction stated in the declaration, does not appear, nor is it averred, to have taken place by process of law; covenants for quiet enjoyment and a general warranty, extend only to lawful evictions. Some of the cases admit, that the action lies for breach of covenant for quiet enjoyment, if the person to whom the right belongs *oust* the possessor. In the

present case, it is not alleged, that the *ouster* was committed by any person having right, or superior title.

It is objected, that the plaintiffs cannot recover on the covenants of *seisin*, and that the grantor had power to convey, because, it is alleged in the declaration, that there was a total defect of title in the defendant, at the time he executed the deed, and that the covenants then broken, could not be assigned over by the first grantee.

There is great force in this objection, and it appears to me conclusive. *Choses in action* are incapable of assignment, at the common law; and what can distinguish these covenants, broken the instant they were made, from an ordinary *chose in action?* The covenants, it is true, are such as run with the land, but here the substratum fails, for there was no land, whereof the defendant was seised, and of consequence, none that he could *aliene;* the covenants are, therefore, naked ones, uncoupled with a right to the soil. This point was determined in the case of *Lewis* v. *Ridge*, Cro. Eliz. 863. The court held, in that case, that the covenant being broken, before the plaintiff's purchase, and so, though the covenants were against the precise encumbrance, that it was a thing in action, which could not be transferred over, and judgment was given for the defendant on demurrer. I cannot find that this case has been overruled. *Spencer's Case*, 15 Co. 17, presents a very distinct question, from the one now under consideration; it involved only the case of an assignee of a *term*, sued by the lessor, with respect to the covenants, which, running with the land, are imposed upon the assignee.

I am, therefore, of opinion, that the defendant must have judgment.

KENT, C. J., THOMPSON, J., and TOMPKINS, J., declared themselves to be of the same opinion.

LIVINGSTON, J. I cannot assent to this opinion. One of the covenants declared on, is that of a seisin in fee of the grantor. It since appearing, that he was not thus seised, and, of course, that this covenant was broken immediately on executing the conveyance, it is now said that it could not be transferred, so as to entitle the assignee to an action for the breach of it.

One would naturally suppose, that every covenant in a deed conveying an estate of inheritance, would pass with the land, and confer on the owner, however remote from a former grantor, a remedy for an unsatisfied violation of any of them, without inquiring when the right of action first accrued. They all extend, by express terms, as well to assigns *ad infinitum*, as to the first grantee. It comports, then, with the contract, and is in itself reasonable, that they should *all* form a part of every grantee's security; nor can it be right, that those who come in under this covenant, which may be the only one in a conveyance, shall not be able to recover any part of a large consideration, merely because an alienation intervened, prior to a discovery of any defect of title. By this means a most useful covenant, and in daily use, will become a dead letter, before it can be enforced, as, very often, repeated sales take place, before a title is discovered to be bad. We

are, however, told, that such is the law, and are referred to some authorities. Between the case of *Lewis* v. *Ridge* and this one, there is a distinction which will be an excuse for not applying it in a way, that the court could not have intended, and which can answer no other purpose, but that of depriving an innocent purchaser of his remedy, and of annulling (which courts sometimes take the liberty of doing) a contract, to which the parties have solemnly bound themselves. The distinction is this. In the case from Croke, the covenant (which was to discharge all *Statutes*, &c., in two years) was not only broken, but this was *known* to the purchaser; for a Statute, which was the encumbrance complained of, was matter of record, and the land, at the time of sale, was *actually* extended for its satisfaction. It was, *therefore*, thought, that the plaintiff had bought a *chose in action*, and the court (which was less indulgent formerly than at present, to these bargains) set its face against him. But in cases of the kind before us, such knowledge can rarely exist, for as soon as a title is discovered to be questionable, there will generally be a stop to farther alienation. The reasoning, therefore, in this case, does not apply; for why punish a person for buying a *chose in action*, by a forfeiture of his remedy, when he neither knew, nor suspected, at the time, that such a right existed? It might be asked, What makes a covenant more a *chose in action* after, than before its breach? In all purchases in fee, has not the land always been considered, as it really is, the thing bargained for, and that the covenants without distinction, necessarily pass with it? Thus we shall get rid altogether of the idea of purchasing a thing in action, which can only be entertained by a fanciful distinction between covenants broken, and those which may be broken in future. Is there in reality, anything more obnoxious or criminal in assigning the one, than the other? If there be any turpitude in the thing, why do courts, nowadays, go so far in supporting transfers of *choses in action*, as to protect the rights of an assignee, though not a party to the record? Another case, more recent, that of *Andrew* v. *Pearce*, 1 Bos. and Pull. New Rep. 158, which was also relied on, proceeded on the ground of the lease being *absolutely void*, prior to its assignment, and that, therefore, *no interest in the land, could pass under it*; of course, there remained *only* a right of action to sell. Now, though the party in that case ought, perhaps, to have been *estoppel*, from saying that *nothing* passed by his deed, yet taking this decision as we find it, and even receiving it, late as it is, as authority, it makes in favor of the plaintiff. From the judgment delivered by Sir James Mansfield, and the reasonings of all the counsel, it is evident, that if *any* interest *in the land* had passed with the assignment, the covenant whenever broken, would have passed with it, and the action been supported. If so, how does it appear, that nothing passed by the deed of Wilcocks, or by the one to the plaintiffs' intestate? Though it was not a fee simple (which must be the only meaning of the averment in the declaration), some smaller estate or interest may have passed, which would have carried the cove-

nant of seisin along with it, and been sufficient to take this case out of the *principle* of *Andrew* v. *Pearce*.

But this is not the ground on which I rest; it is that of the *contract* itself, by the words of which all the covenants passed to every grantee *ad infinitum*, and gave him, of course, an action in his own name, against any preceding grantor, whether a breach happen before or after the assignment, provided no satisfaction has been obtained for it in another name. Nor is it without authority that this ground is taken, for in the *Case of Spencer*, in Sir Edward Coke's reports, it was resolved, "that if the assignee of a *lessee* be evicted, he shall have a writ of covenant, for it is reasonable if he be evicted, that he shall take such benefit of the demise, as the first lessee might, and the lessor hath no other prejudice, than what his *especial contract* with the *first lessee*, hath bound him to." In this lease it is worthy of remark too, that there was no express covenant, but only words which implied one. It is not stated, it is true, when the breach took place, but the lessor without any such distinction, is placed, in relation to the sub-tenant, on precisely the same footing, as it respected a remedy on the lease, as he stood in with regard to his immediate lessee. The court must have considered the contract of assignment as entire, and that with it, not only the land, but all the agreements of the lessor, passed; for it is not easy to be understood, how the covenant of warranty should pass to the grantee, as it is admitted it did, so as to give him a right to sue in his own name, and yet that a different rule is to be applied as to the covenant of seisin.

I concur in the opinion delivered, as to the mode of stating an eviction, in which respect the declaration is imperfect; but the breach of the covenant of seisin being well assigned, the plaintiff, in my opinion, is entitled to judgment.

Judgment for the defendant.[1]

BOOTH *v.* STARR.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1814.

[*Reported* 1 *Conn.* 244.]

THIS was a bill in chancery, brought to the Superior Court in Fairfield County; the facts stated in the bill and found by the court, were these. John Booth, in 1795, conveyed a lot of land in Hudson to Stephen Booth, the plaintiff, with the usual covenants of warranty and seisin. In 1802, the plaintiff conveyed the premises to one McKinstry; McKinstry afterwards conveyed to one Seymour; he conveyed to

[1] See, *accord.*, *Mitchell* v. *Warner*, 5 Conn. 497 (1825), and the American cases generally. *Contra*, *Backus* v. *McCoy*, 3 Ohio, 211 (1827); *Rickard* v. *Best*, 59 Ill. 38 (1871). Cf. *Dickson* v. *Desire*, 23 Mo. 151 (1856).

Thomas Williams; and he conveyed to Elisha Williams, Esq.; there being in each of the deeds the same covenants as in the deed first mentioned. At the time John Booth conveyed the premises, he was not the owner thereof in fee, but the title was in one Lucy Starr, who has since entered and evicted the last grantee; but the plaintiff has not been damnified. The respondents are the administrators of the estate and the heir at law, of John Booth, now deceased, and have his effects in their hands. Upon these facts the respondents contended, that the plaintiff was not entitled to recover. But the court decided otherwise, and decreed the payment of the sum of 2340 dollars to the plaintiff, as damages sustained by him by reason of the aforesaid breach of covenant.

The respondents moved for a new trial, on the ground that the court mistook the law in making such decree. The question of law arising on the motion was reserved for the consideration of all the judges.

N. Smith and *Bristol*, in support of the motion.

R. M. Sherman, contra.

SWIFT, J. The question is, whether in the case of a covenant of warranty annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor, without having been sued by, or satisfied the damages to, the last covenantee, who has been evicted.

A covenant real is annexed to some estate in land; it runs with the land, and binds not only heirs and executors but assignees. Every assignee may, for a breach of such covenant, maintain an action against all or any of the prior warrantors, till he has obtained satisfaction. This results from the nature of the covenant; for each covenantor covenants with the covenantee and his assigns; and as the lands are transferable, it was reasonable that covenants annexed to them should be transferred.

As every covenantor in the various conveyances becomes liable for a breach of covenant to his covenantee and his assignees, it follows of course, that notwithstanding his conveyance of the land, he must, when subjected to pay damages for a breach of the covenant to his covenantee or his assignee, have a right of action for indemnity against his covenantor. This demonstrates that the rights and liabilities of the various parties to a covenant real, continue notwithstanding a conveyance of the land to which it is attached; and that any of them can sustain a proper action when injured by a breach of it.

It has been contended, that a covenant real, like the land, passes by the assignment of the land from the grantor to the grantee, and is thereby extinguished, and the grantor divested of it, so that he can maintain no action for a breach subsequent to the assignment, though it is conceded, that the covenant is revived in favor of the assignor by satisfying the damages for a breach of it. But the grantor does not become totally divested of the covenant by a grant of the land. By the conveyance of the estate, the grantee becomes entitled as assignee to the benefit of the covenants annexed to the land against his grantor,

and all prior grantors; but this does not take away the right which his immediate grantor had to look to his grantor, and all prior grantors for indemnity, in case of a breach of the covenant subsequent to the assignment, for which he is liable to pay damages. It cannot be said, that the covenant is extinguished by the assignment of the land, and then revived by being subjected to pay damages for a breach of it. If the covenant be once extinguished, it cannot be revived without the consent of both parties; and the circumstance that the assignor, on being compelled to pay damages for a breach of it to a subsequent assignee may maintain an action against his assignor, proves that the contract continued in force, and did not become extinguished by operation of the assignment.

To prove that the assignor cannot sue for a subsequent breach, 1 Chitty on Pleadings, 10, has been relied on; where it is said, an assignor cannot sue for a subsequent breach of a covenant running with an estate in lands, but the assignee must sue. This doctrine cannot be true to the extent contended for; as it would prove, that the assignor, after having paid the damages to his assignee, could not call on his assignor; though it is conceded in such case he could maintain an action. But to understand the meaning of Chitty, we must examine the authority to which he refers, 1 Saund. 241 *c* (Wms. edit.). It is there stated, "That the lessor cannot maintain an action of covenant after he has parted with the reversion for any breach of covenant accruing subsequent to the grant of the reversion; for the Statute of Hen. 8 has transferred the privity of contract, together with the estate in the land, to the assignee of the reversion." Thus, if one should lease land, and the lessee covenant to pay rent, or do particular acts on the land, and the lessor assign his interest in the reversion, then the Statute of 32 Hen. 8 transfers the privity of contract, and the assignee of the reversion only can maintain an action against the lessee for a breach of his covenant subsequent to the assignment; for he has the privity of contract and estate, and he only can be damnified by the breach of covenant on the part of the lessee. But suppose a lessor makes a lease with covenant of warranty; and the lessee assigns his interest in the estate; after which his assignee is evicted and recovers damages against him for the breach of the covenant of warranty; it will not be pretended that in this case, the lessee, who has now assumed the character of assignor, cannot maintain an action against his lessor on the covenant of warranty, though the breach happened subsequent to the assignment. The case there stated in 1 Saund. 241 *c*, must have related to covenants to be performed by the lessee, and must be understood to mean, that the lessor cannot bring an action of covenant *against the lessee* after he has parted with the reversion for any breach of covenant accruing subsequent to the assignment; which is a correct principle. It cannot mean that an assignor cannot sue for a subsequent breach; for this in many instances cannot be correct. The authority then relied on has no application to the point in dispute; and I

apprehend the position is undeniable, that in all cases where there have been sundry conveyances of land, with covenants real annexed to them, all the covenants between each party continue operative notwithstanding such conveyance, and every one when damnified can maintain an action.

In the present case, the grantee or covenantee of the plaintiff has been evicted; but the plaintiff has never been sued, nor has he paid the damages. The question is, whether under these circumstances, he can maintain this action against the defendant, who is his immediate covenantor.

The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective; though he may be constantly liable to be evicted; though his warrantor may be in doubtful circumstances, — yet he can bring no action on the covenant till he is actually evicted; for till then, there has been no breach of the covenant, no damage sustained. By a parity of reason, the intermediate covenantees can have no right of action against their covenantors, till something has been done equivalent to an eviction; for till then they have sustained no damage. As the last assignee has his election to sue all or any of the covenantors, as a recovery and satisfaction by an intermediate covenantee against a prior covenantor would not bar a suit by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action till he has satisfied the subsequent assignee; for otherwise every intermediate covenantee might sue the first covenantor; one suit would be no bar to another; they might all recover judgment, and obtain satisfaction; so that a man might be liable to sundry suits for the same thing, and be compelled to pay damages to sundry different covenantees for the same breach of covenant. In the present case, the plaintiff cannot know that his covenantee who has been evicted will ever sue him; he may bring his action directly against the defendant; a recovery in this suit, and payment of the damages, would be no bar; the defendant could then have no remedy but by petition for new trial; and if the plaintiff in the mean time should become unable to refund the money, the defendant would, by operation of law, be compelled to pay the same demand twice, without redress. But if the principle is adopted that the intermediate covenantee can never sue till he has satisfied the damages, no such injustice can ensue.

The subject may be considered in another view. In all these cases it is the duty of the first covenantor to make good the damages for a breach of the covenant, and to indemnify all the subsequent covenantees. Each subsequent covenantor is liable to all the subsequent covenantees, and on paying the damages will have a claim for indemnity against a prior covenantor. The nature then of the engagement of the first covenantor is, to indemnify all the subsequent covenantees from all damages arising from his breach of the covenant.

It may be proper, then, to examine what is necessary to give the

surety a right of action against the principal. It would seem to be a clear dictate of reason, that the mere liability to pay money for another, he continuing liable to pay the money himself, can never be a cause of action on the contract of indemnity; for it is uncertain whether the surety will ever be compelled to pay, and the principal may pay himself. Such uncertainty can be no ground of action. It is not necessary that actual payment should be made. If a suit should be brought, judgment rendered, or the person imprisoned, it will be sufficient; but mere liability, without any damage, is not. On this point no doubt could be entertained were it not for the decision in the case of *Filly* v. *Brace*, 1 Root, 507, where it is distinctly laid down, that mere liability, without any damage, is sufficient cause of action.

In examining this question it may be premised, that there is a difference between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damages by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid. But if it be to discharge or acquit the plaintiff from any damage by reason of such land or particular thing, then it is a condition to indemnify and save harmless. 1 Saund. 117, n. (1), (Wms. edit.). In the case of *Filly* v. *Brace*, much reliance is placed on cases of actions sustained by sheriffs for escapes when they had not paid the debt to the creditor. The ground is assumed, that the liability of the sheriff to pay the debt gives the right of action; but this is an erroneous assumption. The wrong done by the escape itself furnishes a cause of action. The sheriff would be entitled to recover, admitting he was not liable to the creditor. Suppose an escape, and before suit brought the debtor escaping pays the debt to the creditor, this would be no bar to an action; for by the wrongful act of the escape, a right of action accrued to the sheriff, which cannot be discharged without his concurrence; and the payment of the debt to the creditor could only go in mitigation of damages.

The case of *Griffith* v. *Harrison*, 1 Salk. 197, is also cited. That was a covenant to be discharged and indemnified from all arrears of rent; and the breach alleged was, that rent was in arrear. The court determined the declaration to be bad, because rent remaining in arrear and not paid, is not a damage, unless the plaintiff be sued or charged; and if paid at any time before such damage incurred by the plaintiff, it is sufficient. This is an unanswerable and conclusive authority to disprove the doctrine it is adduced to maintain. Here the liability to pay the rent is acknowledged; and the court say, it is not a damage, unless the plaintiff be sued or charged; and if paid at any time before, it is sufficient. So it may be said in the case of *Filly* v. *Brace*, the debt remaining unpaid is not a damage, unless the plaintiff be sued or charged; if the defendant pays it any time before the plaintiff is sued, he is not liable.

But the court do not seem to rely upon the principal point decided in that case, but on a *dictum* contained in the report. It is there said, that where the counter bond or covenant is given to save harmless from a penal sum before the condition is broken, then if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter bond forfeited. This is the precise principle decided in the case of *Abbots* v. *Johnson*, 3 Bulstr. 233, cited in the case of *Filly* v. *Brace*, as proving the doctrine that mere liability is a ground of action. As these two cases contain but one decision which is reported at large in Bulstrode, I will examine that authority, and see whether it supports the doctrine for which it was cited. That was an action of debt on an obligation, and the case was, the plaintiff was bound in a bond with the defendant for payment of money on a day to come, and had a counter bond from the defendant for saving him harmless. The defendant paid not the money at the day. Upon this his default, the plaintiff brought his action on the counter bond. To this the defendant pleaded *non damnificatus*. The plaintiff replied, showing all this matter, and that he requested the defendant to pay this money, which he did not do; on which there was a demurrer. And the question was, whether this non-payment of the money at the day by the defendant be a present forfeiture of the counter bond, without other damage. The court decided, that the failure of payment at the day by the defendant, by which he put the plaintiff in danger of being arrested, was a damnification to him, and a present breach of the condition, and a forfeiture of the counter bond. Here it must be noted, that there was a bond conditioned to pay money at a future day; and the ground of the decision is, not the liability, but the failure of paying the money. When the plaintiff gave the penal bond with the defendant payable at a future time, no liability to be sued, or to pay the penalty, existed. When the counter bond was taken to save him harmless, it was in effect an engagement that he should never be liable to pay the money, or be subjected to the penalty. The failure to pay the money on the bond by the day rendered the plaintiff liable to pay the penalty; and this was a present breach of the condition of the counter bond; for by the non-payment of the money, a liability accrued which did not before exist, and this very liability arising from the failure of paying the money at the day, was the ground of sustaining the action. This is very far from proving, that where there is a contract to save harmless from an existing liability, such liability is a ground of action. Indeed, the fair inference is, that such liability is not to be deemed a ground of action from the circumstance that the court considers the failure of paying the money at the day as the forfeiture of the counter bond. I apprehend no authority can be found, that will support the doctrine laid down in *Filly* v. *Brace*; and the cases cited in favor of it, directly disprove it.

But let us examine this question on principle. What is the nature

of the contract to indemnify and save harmless? It is not that the plaintiff shall never be liable. The existence of the liability is the ground of the contract; and the object of it is to make good to the plaintiff any damage he may suffer by reason of it. This liability against the consequences of which the contract is to indemnify, cannot be a breach of the contract itself. There must be actual damage arising from it to constitute a breach according to the terms of it. If liability without damage be a cause of action, then the contract is broken the moment it is made; and the defendant may be sued. He may be subjected to pay it to his surety: and as this will be no bar to a suit by the creditor, he may be compelled to pay it again, and then seek his remedy against the surety. The law will not countenance such absurdity and injustice. Nor is there any danger from delay to the surety; for if he suspects that the principal is in doubtful circumstances, he may at any time satisfy the demand; and then he has a clear right of action on the contract of indemnity.

This point is equally clear on authority. In all cases where the condition of the bond or contract is to indemnify and save harmless, the proper plea is *non damnificatus*. The defendant may say, that the plaintiff has not been damnified; and then it is necessary for the plaintiff to reply and show the damage to entitle him to recover. This incontestably proves that liability is not a ground of action; for the plea admits the existence of the liability, and denies the damage; and the reply setting forth the damage shows it to be necessary to constitute a ground of action. Suppose to the plea of *non damnificatus*, the plaintiff should reply the liability only? Will any lawyer say, that such reply is good? If not, the consequence is, that something more than liability must be shown; and this must always be actual damage.

In this opinion the other judges severally concurred.

New trial to be granted.

WITHY *v.* MUMFORD.

SUPREME COURT OF NEW YORK. 1825.

[*Reported* 5 *Cowen*, 137.]

ON demurrer to the declaration. This was of a plea of breach of covenant, and stated that on the 21st of February, 1814, the defendant, by indenture between him and one Harnden, did grant, &c., to Harnden in fee, certain lands (describing them); and that he did covenant, &c., with Harnden, his heirs and assigns, &c., to warrant and defend the premises, &c., against all persons claiming, &c.; that on the day of the execution of this indenture, Harnden entered into possession of the premises, &c.; and afterwards, March 12th, 1817, by indenture between him and the plaintiff, conveyed the same premises to the plaintiff, in fee, who entered, &c.; but was afterwards evicted by certain

persons having lawful title, before the defendant conveyed to Harnden. And so, &c.

The defendant craved oyer of the indenture between Harnden and the plaintiff, which was granted; and the indenture set forth, contained a covenant of warranty from Harnden to the plaintiff, his heirs and assigns. For this cause,

Demurrer and joinder.

J. A. Collier, in support of the demurrer.

S. Sherwood, contra.

Curia, per SAVAGE, C. J. The point on which the defendant relies, is, that the deed from Harnden to the plaintiff containing a covenant of warranty, he cannot sue as assignee.

In the days of Lord Coke, the law was understood differently. He says, "If a man enfeoffeth A. to have and to hold to him, his heirs and assigns: A. enfeoffeth B. and his heirs: B. dieth, the heir of B. shall vouch as assignee to A.: so as heirs of assignees, and assignees of assigns, and assignees of heirs, are within this word (assigns); which seemed to be a question in Bracton's time. And the assignee shall not only vouch, but also have a *warrantia carta*." Co. Lit. 384 b, and the authorities there cited.

The same doctrine is found in *Spencer's Case*, 5 Rep. 17, and in all the books. That the covenant to warrant and defend, is a covenant which runs with the land, and that the assignee is entitled to the benefit of all such covenants, is a proposition which needs not the citation of an authority for its support. The doctrine will be found, however, in 4 Cruise's Dig. 452, 3 to 7.

The case of *Middlemore* v. *Goodale*, Cro. Car. 503, was an action by the assignee on the covenant for further assurance. The defendant pleaded a release from J. S. with whom he made the covenant, which release was executed after the commencement of the suit. All the court agreed, that the covenant ran with the land, and that the assignee should have the benefit of it.

From these authorities it is clear that the covenant of warranty runs with the land, and is intended for the benefit of the grantee, his heirs or his assigns, according to the language of the covenant itself.

But it is contended by the defendant, that though the assignee of the grantee may generally resort to the original grantor, for a breach of the covenant happening after the assignment; yet he has not such remedy, when he has a warranty from his immediate grantor. There is surely nothing in the covenant of warranty itself, to justify such a doctrine; nor is there any reason growing out of the acts of the parties, why the assignee, by taking a warranty from his immediate grantor, should lose his claim upon the first grantor. It cannot operate by way of release. If this were the consequence, a quitclaim deed would often be a better conveyance than one with full covenants.

It is contended, however, that this doctrine is supported by authority,

and the cases of *Greenby* v. *Wilcocks*, 2 John. 1, and *Kane* v. *Sanger*, 14 John. 89, are cited.

The case of *Greenby* v. *Wilcocks* decides, that an action upon the covenant of seisin, cannot be brought by the assignee, because the grantor, having no title when the covenant is made, it is broken immediately, before the assignment, and when broken, becomes a mere *chose in action*, and, as such, is incapable of assignment. This being the only reason given, it would seem to follow, that whoever was owner of the land, which was the *substratum* of the covenant, would be entitled to prosecute for the breach of a covenant running with that land, if broken while the land was in his hands. This case, therefore, proves nothing against the plaintiff's right of recovery in the principal case, but rather supports it. The plaintiff, an assignee, has been evicted. The covenant remained unbroken, till after the assignment to him. He has been damnified, not the original grantee, Harnden; and if the defendant's doctrine be correct, Harnden may recover damages which he never sustained, and may pocket the money; while the plaintiff, upon whom the whole loss has fallen, can recover nothing, if Harnden be unable to respond. Such a doctrine I should hold utterly untenable, were it not for what was said by the late Chief Justice Spencer, in the case of *Kane* v. *Sanger*.

That was an action of covenant, brought to recover damages for an eviction of the plaintiff's grantees. The counsel for the plaintiff seems not to have argued the main point; but placed his right to recover upon a variance between the defendant's notice and proof. Spencer, J., in delivering the opinion of the court, says, "It is a general rule, that where covenants run with the land, if the land is assigned or conveyed, before the covenants are broken, and afterwards they are broken, the assignee or grantee can alone bring the action of covenant to recover damages; but if the grantor or assignor is bound to indemnify the assignee or grantee, against such breach of covenant, then the assignor or grantor must bring the action." And he cites 2 Mass. Rep. 460.

In a subsequent part of the opinion, he admits, that to avoid circuity of action, a release from the plaintiff's grantees to the defendant, would have been a bar to the suit, but for the circumstance, that they had given the plaintiff mortgages; and the mortgages reinvested the title in the plaintiff; so that, in effect, there were no assignees. The plaintiff having conveyed away the property, and received it back, stood as if no conveyance had ever been executed by him. These mortgages had been assigned to Morris; and it was a fact in the case, that the suit was brought by the direction, and for the benefit of Morris; so that the recovery, after all, was virtually in favor of the assignee.

The remark, therefore, that the assignee, with warranty, could not maintain an action, as assignee, for a breach after the assignment, was not called for. It professes to be supported by no authority, but the case of *Bickford* v. *Paige*, 2 Mass. Rep. 460, *per* Parsons, C. J.

With the greatest deference, I do not understand such doctrine to be there asserted. The case itself was an action by the covenantee, against the covenantor; and breaches were assigned upon the covenants of warranty, of seisin, and against encumbrances. The defendant pleaded, that the plaintiff, before suit brought, had conveyed to one Roberts, without any covenants making him liable for any defect of title. The plaintiff, in his replication, set out his deed to Roberts, being a release with warranty against himself, his heirs and assigns. To this replication the defendant demurred. No encumbrances were shown, nor any eviction. The court, therefore, decided, that the plaintiff ought to recover on the covenant of seisin, on the ground that this covenant having been broken before the plaintiff's release to Roberts, it was a *chose in action*, unassignable in its nature; and, therefore, did not pass to Roberts by the release. Parsons, C. J., in the course of delivering the opinion of the court, advances the doctrine relied on by the late Chief Justice of this court, in these words: "It is a general rule, that when a feoffment or demise is made of land with covenants that run with the land, if the feoffee or lessee assign the land, before the covenants are broken, and afterwards they are broken, the assignee, only, can bring an action of covenant, to recover damages, *unless the nature of the assignment be such, that the assignor is holden to indemnify the assignee against a breach of the covenants by the feoffor or lessor*. This rule is founded on the principle, that no man can maintain an action to recover damages, who can have suffered no damages."

Here, it is distinctly asserted, that the grantee, who is also the assignor, can maintain no action for damages, if he is himself not liable to his assignee. Why? because he can have suffered no damages. The assignee, who has suffered damages, and he only, can bring the action in such a case. But, if the assignor has covenanted to warrant the assignee, and has actually sustained damage, in consequence of his covenant, by a recovery against him, then he has his remedy over against his grantor. Having been damnified, he is thereby reinvested with his original rights. Then he will have suffered the damages, which he seeks to recover on the covenant to himself; and, in such a case, the assignee is not the only person, who, under any circumstances, may prosecute the original grantor. That this is what Chief Justice Parsons meant, is evident from what he lays down as the foundation of the rule. The reason he gives is, *that no man can recover damages, who has sustained none*. Mere liability is not enough. Actual damage must have been suffered by the assignor, to authorize the action by him. To place any other construction upon the language of Chief Justice Parsons, is to render him inconsistent with himself; besides making him stem the whole current of authority.

This subject has been very fully discussed in *Booth* v. *Starr*, 1 Conn. Rep. N. S. 244. The facts were, that J. Booth conveyed with warranty, to S. Booth, a lot of land in Hudson. Booth conveyed to a

third person, he to a fourth, and he to the fifth grantee; all with covenants of warranty and seisin. The last grantee was evicted: but the plaintiff, S. Booth, was not damnified. Swift, J., states the question to be, whether, in the case of a covenant of warranty, annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor, without having been sued by, or satisfied the damages to the last covenantee, who has been evicted.

The question was discussed with great learning and ability, and at considerable length; and the court expressly decided, that the last covenantee, who has been evicted, may prosecute any, or all of the preceding covenantors, till he obtain satisfaction; but that no intermediate covenantee can sue his covenantor, till he himself has been compelled to pay damages upon his own covenant.

In this case, the plaintiff might have sued Harnden, his own immediate grantor. He did not choose to do so. Harnden may have been dead, or insolvent, or the plaintiff may have had other reasons for preferring a direct resort to the defendant. It is sufficient for his purpose, that he had a legal right to do this.

In the case of *Garlock* v. *Closs*, decided by this court, in May Term, 1824, a similar action was sustained by an intermediate covenantee, who had been damnified, though the property had passed through four different grantors, with warranty, down to himself. The plaintiff is entitled to judgment. *Judgment for the plaintiff.*

CLARK *v.* SWIFT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported* 3 *Met.* 390.]

COVENANT broken. The declaration alleged that the defendant, on the 2d of June, 1815, by his deed conveyed certain land in Andover to Thomas Holt, and in said deed covenanted with Holt, his heirs and assigns, that the conveyed premises were free from all encumbrances: That the plaintiffs, by virtue of a conveyance of said land by Holt, and by sundry subsequent conveyances thereof, have acquired title thereto, and, on the 5th of November, 1830, became the assigns of the defendant, and ought to have and enjoy the land free of all encumbrances, according to the defendant's covenant aforesaid: That the land, when the defendant so conveyed it to Holt, was not free from all encumbrances, and never since has been; but that the defendant, on the 9th of April, 1814, conveyed to Ralph H. Chandler, his heirs and assigns, a right of way over said land, and "the privilege of going to and using the well and pump" upon said land: which rights "still exist, and did exist at the time of making said deed to said Holt, and have existed ever since," as an encumbrance on the land.

At the trial before *Putnam*, J., the facts stated in the plaintiffs'

declaration were proved or admitted, and a verdict was returned for the plaintiffs, subject to the opinion of the whole court, whether they could maintain the action.

Several points of defence, which were raised on the evidence, and ruled against the defendant at the trial, are here omitted, as it became unnecessary for the court to decide upon them.

This case was argued at Boston, January 21, 1841.

Hazen, for the defendant.

F. Cummins, for the plaintiffs.

WILDE, J. At the trial of this cause several questions of law were raised and reserved for the consideration of the court, most of which, according to the view we have taken of the case, become immaterial, as we consider one objection to the form of the action conclusive in favor of the defendant.

The action is founded on the alleged breach of the defendant's covenant against encumbrances in his deed to Thomas Holt of the premises described in the writ, and from whom the plaintiffs derive their title. The breach alleged is, that at the time of executing said deed to the said Holt, the land conveyed to him was not free from all encumbrances, but that the defendant had before that time granted a passage and right of way, over and along said land conveyed, to one Ralph H. Chandler; which encumbrance, it is averred, still exists, and did exist at the time of making said deed to said Holt, and has existed ever since. Thus it appears, by the plaintiffs' own showing, that the covenant on which they rely was broken as soon as made; and that a covenant thus broken does not run with the land, is a well-established doctrine of the common law. A right of action for the breach of this covenant immediately accrued in favor of Holt, and this chose in action, like all other choses in action, is not assignable, so as to authorize the assignee to maintain an action in his own name. An assignee cannot sue upon a breach of covenant that happened before his time. Com. Dig. Covenant, B. 3. Bac. Ab. Covenant, E. 5. The case of *Lucy* v. *Levington*, 2 Lev. 26, is a leading authority on this point, in which it was decided that an action by the executor of the covenantee upon a covenant for quiet enjoyment of land conveyed was well brought; the breach assigned being that the plaintiff's testator was evicted in his lifetime, and so the covenant being broken, did not go with the land to the heir. So in *Lewis* v. *Ridge*, Cro. Eliz. 868, which was an action by an assignee, on a covenant which had been broken before the assignment, it was held that for such a breach, being a thing in action not transferable by law, an action was not maintainable in the name of the assignee.

A different doctrine, however, was laid down in the case of *Kingdon* v. *Nottle*, 4 M. & S. 53, in which it was held that an action might be maintained by a devisee of the grantee of land, on the covenant of seisin, although broken in the lifetime of the testator; the breach being considered as continuing in the time of the devisee. It was also

decided in *Kingdon* v. *Nottle*, 1 M. & S. 355, that for such a breach of covenant no action could be maintained by the executor of the grantee. But it seems difficult to reconcile these decisions with the former authorities, and with the well known rule of the common law, that choses in action are not assignable; and they are certainly against the current of subsequent authorities.

In the case of *Bickford* v. *Page*, 2 Mass. 455, it was decided that the covenant of seisin, having been broken immediately on the execution of the deed, was then a chose in action, and not assignable. So in *Prescott* v. *Trueman*, 4 Mass. 627, it was held that the covenant against encumbrances is broken immediately by any subsisting encumbrance. And recently, in *Thayer* v. *Clemence*, 22 Pick. 493, 494, the same doctrine is laid down by the Chief Justice, in delivering the opinion of the court: "the usual covenants in a deed of warranty, are, that I am seised, &c., that I have good right, &c., that the premises are free of all encumbrances. These," he says, "are all *in præsenti*, and if the facts covenanted to be true are not so, the covenants are broken when made, the right to enforce them is a chose in action, and cannot be assigned so as to enable an assignee to bring an action in his own name."

The same doctrine is held in New York: *Greenby* v. *Wilcocks*, 2 Johns. 1; *Hamilton* v. *Wilson*, 4 Johns. 72; *Kane* v. *Sanger*, 14 Johns. 89; and in New Jersey: *Chapman* v. *Holmes*, 5 Halst. 29; *Garrison* v. *Sandford*, 7 Halst. 261; and in Vermont: *Garfield* v. *Williams*, 2 Verm. 327; and in Connecticut: *Mitchell* v. *Warner*, 5 Conn. 497. In the latter case Chief-Justice Hosmer examined the doctrine and the authorities very fully, and with great ability; and particularly the case of *Kingdon* v. *Nottle*. "From the opinion in that case," he declares, "I am compelled to dissent *in omnibus*. First, I affirm that the novel idea attending the breach in the testator's lifetime, by calling it a continuing breach, and therefore a breach to the heir or devisee at a subsequent time, is an ingenious suggestion, but of no substantial import. Every breach of a contract is a continuing breach, until it is in some manner healed; but the great question is, *To whom* does it continue as a breach? The only answer is, To the person who had title to the contract, when it was broken. A second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces. It has no analogy to a covenant to do a future act at different times, which may undergo repeated breaches." He concludes, therefore, that the determination in the case of *Kingdon* v. *Nottle* "is against the ancient, uniform, and established law of Westminster Hall, and against well-settled principles and decided cases in the surrounding States."

These objections to the decision in the case reviewed are certainly very forcibly expressed. That decision, as Chancellor Kent remarks, was severely criticised. But we concur in the opinion that the decision cannot be reconciled with a well-established principle of the common

law. The distinction on which the principle, that choses in action are not assignable, is evaded, is not well founded. Chancellor Kent says, "The reason assigned for the decision is too refined to be sound." 4 Kent Com. (3d ed.) 472. There was not in that case, and there could not have been, but one breach of the covenant of seisin. "It was single, entire, and perfect, in the first instance," and thereupon a right of action vested in the testator; and, unless this right could by law be transferred to the devisee, no action in his name could be maintained in a court of law. This rule as to choses in action is a technical rule, it is true, and does not affect the merits of the case. But technical rules, and rules as to the forms of proceedings, must be observed, without regard to the consequences which may follow in particular cases; otherwise, the stability of judicial decisions, and the certainty of the law, cannot be preserved.

As to the rule in question, it interposes a formal difficulty only; and it is no actual obstruction to the due administration of justice. The assignment of a chose in action is valid in equity, and courts of law will take notice of equitable assignments, made *bona fide* and for a valuable consideration, and will allow the assignee to maintain an action in the name of the assignor.

In the present case, however, the action could not be maintained, although it had been brought in the name of Holt, the original grantee; because it is clear that the action accrued to him more than twenty years before the present action was brought, if in fact there was an existing encumbrance on the granted premises, at the time of the grant. The action, therefore, would be barred by the Statute of Limitations. It is true, that if such an action had been brought before any disturbance of the possession, and before the encumbrance had been removed, the plaintiffs would have been entitled to only nominal damages; but then twenty years are allowed, in such a case, after the breach of the covenant, for the party to clear away the encumbrance, and to entitle himself to a full indemnity. And if he lies by until the limited time expires, without removing the encumbrance and commencing his action, the Statute of Limitations will certainly be a good bar.

The plaintiffs' only remedy, if they have any, is on the covenant of warranty. That covenant runs with the land; and if the plaintiffs had been evicted by a paramount title, they could undoubtedly maintain an action for the breach of that covenant, in their own names. Whether the facts reported show such a disturbance of the possession as would be considered equivalent to an eviction by a title paramount, is a question upon which at present we give no opinion. The question cannot be raised in this case, unless the plaintiffs should move for leave to amend their declaration, which may be allowed on such terms as the court may hereafter direct.

(On motion the plaintiffs had leave to amend their declaration.)[1]

[1] See, *accord*, *Mitchell* v. *Warner*, 5 Conn. 497 (1825). *Contra*, *M'Cord* v. *Ferguson*, 1 Nott & McC. 104 (1818).

COLE *v.* KIMBALL.

SUPREME COURT OF VERMONT. 1880.

[*Reported* 52 *Vt.* 639.]

COVENANT. The declaration counted on a covenant against encumbrances in a deed from the defendant to the plaintiff Florette. The case was referred, and the referee reported in substance as follows:

On August 26, 1871, the defendant by warranty deed containing the usual covenants, including a covenant against encumbrances, conveyed to the plaintiff Florette certain premises in Braintree that had been conveyed to him by Mansel Heselton and wife; and said Florette, in payment therefor, conveyed to the defendant a farm which had before been conveyed to her by her father, Leonard Fish, and with her husband executed to him a promissory note for $462, which said Leonard afterwards paid. On June 11, 1872, the plaintiffs by like deed conveyed the premises to Lucia M. Fish, the mother of said Florette, and wife of said Leonard. The premises when conveyed by the defendant as aforesaid, were subject to a mortgage executed by Heselton and wife to Elihu Hyde in 1869, conditioned for the payment of two promissory notes for $250 each, payable in one and two years respectively, with interest, one of which only had been paid. In December, 1875, Hyde brought a petition for foreclosure against the Fish's and others, but not against the Heseltons nor the Coles, and in the following January obtained a decree for $313.29, the sum due in equity, and $28.55 costs, to be paid before January 1, 1877, with interest. On November 1, 1876, Hyde sold and assigned that decree to Ephraim Thayer for $350. Thayer acting therein for said Leonard and at his request; and afterwards, and before this action was brought, said Leonard, acting therein for his wife, paid Thayer the amount of the decree in full, with interest. The conveyance from said Leonard to said Florette, and from her to said Lucia were without consideration, and they and the holding of title by said Florette were for the convenience, and at the request, of the Fish's, said Leonard doing all the business in connection therewith, and the plaintiffs having nothing to do with it, except to execute deeds, &c., as desired. This action was brought and prosecuted by said Lucia, in her own behalf and for her own benefit, and with the privity and consent of said Leonard. The referee found that if the plaintiffs were entitled to recover, they should recover $341.84, with interest from January 1, 1876.

While the action was pending the Fish's, in consideration that final judgment should ultimately be rendered therein for the plaintiffs for the full amount of damages found by the referee, filed in court a release of the defendant from all causes of action that they or either of them had.

or could have, in their own names to recover damages consequent on a breach of any of the covenants in his deed to said Florette.

The court at the December Term, 1879, *Powers*, J., presiding, rendered judgment on the report for the plaintiffs for nominal damages and costs; to which the plaintiffs excepted.

P. Perrin and *J. W. Rowell*, for the plaintiffs.

N. L. Bigelow, for the defendant.

The opinion of the court was delivered by

ROYCE, J. It is conceded that the plaintiffs are entitled to nominal damages; and the only question made is, whether upon the facts found by the referee they are limited to the recovery of such damages, or are entitled to recover the amount paid to redeem the premises from the Hyde decree. This suit was brought and prosecuted by Lucia M. Fish, for her benefit, with the privity and consent of her husband, Leonard Fish, who acted for her in paying the money to redeem the premises from the Hyde decree. Florette D. Cole held the title to the premises conveyed to her by the defendant as the trustee of Leonard and Lucia M. Fish, and the covenants contained in the deed from the defendant to Florette D. are in equity to be treated as covenants for the benefit of the *cestuis qui trust*. All the interest that Florette D. had in said covenants passed to Lucia M. Fish by the deed from the plaintiffs to her. The defendant is liable on the covenants in his deed to protect the title against the encumbrances that were upon the premises described in the deed at the time of its execution. The covenant against encumbrances runs with the land, and can be enforced for the benefit of the party holding the legal title. The payment of the amount due on the Hyde decree was not a voluntary payment, but a compulsory one. Fish was obliged to make it to save his title to the premises. The claim to indemnity on account of the breach of the covenants of title and against encumbrances was a chose in action, and was transferred to Lucia M. Fish by the deed from the plaintiffs to her; and the assignee of a chose in action has the right (subject to the right of the assignor to require indemnity against costs) to sue in the name of the assignor. It is a matter of indifference to the defendant to whom he pays, if he is fully protected against any further liability. It is not claimed that there is any other party but Leonard Fish and wife that could make any claim against the defendant on account of his covenants; and the discharge filed in the case is a full protection against any claim that they might otherwise make. The rule of law that limits the recovery in actions of covenant against encumbrances to the amount paid to remove the encumbrance was adopted for the protection of the covenantor, for until full payment the liability of the covenantor would continue. The cases relied upon by the defendant differ from this in the important fact that in none of those cases did it appear that the suit was being prosecuted for the benefit of an assignee who had been compelled to make payment to save his estate, and full indemnity had been tendered to the covenantor. The attempted defence is purely technical; and it

does not appear that any defence which the defendant might have made if the suit had been in the name of Leonard Fish and wife was not equally available to him in the present suit. In *Smith* v. *Perry, Admr.*, 26 Vt. 279, the plaintiff had not paid the judgment recovered by his grantee on account of the breach of his covenant of title, but the court allowed a full recovery to be had, protecting the defendant's estate against further liability by the form of the judgment rendered. Here, as we have seen, the defendant is protected by the discharge filed.

Judgment reversed, and judgment for the largest sum.

CHAPTER VIII.

EXECUTION OF DEEDS.

Conveyance by Disseisee. The Statute of 32 Hen. VIII. *c.* 9, enacted that no person should buy or obtain "any pretenced rights or titles" to any lands, tenements, or hereditaments, upon pain that the buyer and seller should each forfeit the value. This Statute not only imposes a penalty, but avoids the conveyance. *Doe* d. *Williams* v. *Evans*, 1 C. B. 717. It is said to have been in affirmance of the common law. *Ib.* See *Hathorne* v. *Haines*, 1 Greenl. 238, 247.

If a disseisee makes a deed purporting to convey his title, yet the title remains in him, and he can maintain an action to recover the land from the disseisor. *Brackett* v. *Whiting*, 5 Pick. 348. See *Livingston* v. *Proscus*, 2 Hill, 526.

If the disseisee peaceably enters upon the land, and there delivers a deed thereof, the deed will pass his title. *Warner* v. *Ball*, 13 Met. 1. And a deed by a disseisee is good against all the world except the disseisor and those claiming under him. *M'Mahon* v. *Bowers*, 114 Mass. 140.

In many of the States, by Statute, disseisees can convey their interests as against the disseisors. See Stimson, Am. Stats. § 1401. And in some States the same result is reached without the aid of Statutes. *Cresson* v. *Miller*, 2 Watts, 272; *Pogus* v. *Wilkins*, 12 Rich. 420; *Hall* v. *Ashby*, 9 Ohio, 96.

As there is no seisin of easements, the doctrine that a disseisee cannot convey has no application to them. See *Randall* v. *Chase*, 133 Mass. 210, 214; *Corning* v. *Troy Iron Foundry*, 40 N. Y. 191, 204. And it has been held not to apply to a conveyance to a purchaser at a sale on execution or otherwise by order of court. See *M'Gill* v. *Doe* d. *M'Call*, 2 Ind. 396. It was further *held*, in *Webb* v. *Thompson*, 23 Ind. 428 (1864), that the deed by a purchaser at an execution sale was good, although the land continued in the adverse possession of the judgment debtor. But the contrary was *held* in *Bernstein* v. *Humes*, 60 Ala. 582 (1877). See also *Violett* v. *Violett*, 2 Dana, 323.

If the disseisee's grantee enters peacefully upon the land, he has been allowed to use his title to defend himself against a writ of entry. *Cleaveland* v. *Flagg*, 4 Cush. 76, 82 (1849).

And when the grantee had sued in the name of his grantor, and recovered judgment, it was *held* that the grantor could not release to the disseisor. *Edwards* v. *Parkhurst*, 21 Vt. 472 (1849). But a deed from the grantee to the disseisor, releases the right of the disseisee. *Farnum* v. *Peterson*, 111 Mass. 148 (1872).

After judgment in an action against the disseisor, brought by the grantee of the disseisee in the name of his grantor, the disseisor cannot bring trespass against the grantee for acts done before the rendering of the judgment. *Edwards* v. *Rees*, 18 Vt. 473 (1846). See *Hathorne* v. *Haines*, 1 Greenl. 238.

That there may be a possession which is not adverse so as to make a deed champertous, and which yet may be adverse so as to raise the bar of the Statute of Limitations, is said in *Crary* v. *Goodman*, 22 N. Y. 170 (1860).

SECTION I.

SIGNING AND SEALING.

NOTE. — "The first question is, whether it is necessary by the Statute of Frauds that a lease under seal should also be *signed*. The words of the first section are, 'all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages,' &c., 'made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only.'

"The plea in this case is framed in the very words of the plea in the case of *Cardwell* v. *Lucas*, 2 M. & W. 111, in which it does not seem to have occurred to the court or the counsel that the words 'signed by the *parties*,' &c., might apply only to instruments not under seal. It is now argued, that inasmuch as the previous words are 'made or created by livery and seisin only, or by parol,' the distinction apparently intended to be established by the Statute of Frauds was between estates or interests created by a formal instrument, and those created by mere matter *in pais*, which must be established by the fallible recollection of witnesses. Mr. Justice Blackstone, in his Commentaries, vol. ii. p. 306, lays it down that the Statute of Frauds has restored the old Saxon form of *signing*, and superadded it to sealing and delivery in a case of a deed. Mr. Preston, on the other hand, in his edition of Sheppard's Touchstone, p. 56, note 24, treats this passage in Blackstone as a mistake from not attending to the words of the Statute, and holds it clear that no signature is necessary in the case of a deed. It is curious that the question should now for the first time have arisen in a court of law, and perhaps as curious that it is not necessary now to determine it; for although the plea negatives signature only, and not sealing or delivery, by the plaintiffs and the deceased, yet it appears by the indenture, as set out on over, and thereby become part of the declaration, that it was not sealed by the plaintiffs." — *Per* LORD DENMAN, C. J., in *Cooch* v. *Goodman*, 2 Q. B. 580, 596–598 (1842).

"PARKE, B. . . . It is unnecessary to give an opinion on the other points; but I must own that I think a deed is not within the Statute of Frauds, because, in my opinion, that Statute was never meant to apply to the most solemn instrument which the law recognizes. I also think that the notice which refers to the deed would, if it were necessary to have recourse to it, be a sufficient note or memorandum within the Statute. I do not mean to be concluded by this expression of my opinion on the two latter points, but only to state my present impression.

"ALDERSON, B. I also think that *Donellan* v. *Read* [3 B. & Ad. 899] is good law; but even if it were not, this case would not require its assistance, because, this being the case of a deed, it must be taken to have been sealed by the parties in due form, and the Statute does not apply to such instruments, but only to parol agreements.

"ROLFE, B. I am strongly inclined to think that the Statute does not extend to deeds, because its requirements would be satisfied by the parties putting their mark to the writing. The object of the Statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the Statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark.

"PLATT, B., concurred." — *Cherry* v. *Heming*, 4 Ex. 631, 636 (1849).

LORD SAY AND SEAL'S CASE.

QUEEN'S BENCH. 1711.

[*Reported* 10 *Mod.* 40.]

UPON a trial at bar in the Court of Queen's Bench, in an ejectment brought by the heirs at law against the Lord Say and Seal, who claimed as heir in tail;

The single question was, Whether or no a *common recovery* that was suffered in order to dock the entail, was good or not?

The objection to the recovery was, that there was no tenant to the *præcipe*.

To prove the recovery good, a deed bearing date the twenty-third of October, 1701, directing the uses of the recovery, and the fine, viz. the chirograph of the fine, and common recovery, were produced.

[The court held that the fine had created a good tenant to the *præcipe*. This part of the case is omitted.]

After this, there was a deed of *bargain and sale* enrolled produced, which would have made a good tenant to the *præcipe* had the opinion of the court been against the plaintiffs, as it was for them.

But to this deed this objection was made, that it was a tripartite deed, and ran to this effect: "This indenture, made the day of , between of the one part, and of the second part, and of the third part, witnesseth, That for and in consideration of the sum of five shillings, to him in hand paid, hath given and granted, &c." Now here they said the person granting is wanting, "hath granted," without saying who hath granted, and consequently this deed passes nothing, and can therefore make no tenant to the *præcipe*.

The court was of opinion, that the deed was good. Had this been a tripartite deed, without this slip, there had been no doubt at all in the case; but the deed is tripartite, and "hath" in the singular number, and therefore all the doubt is to whom the "hath" refers. Deeds are to be interpreted, as much as possible, according to the intention of the parties. The case of *Hasbecood* v. *Mansfield*, 2 Vent. 196, was a case upon pleading, where greater strictness is required, and therefore does not come up to the case in point. The case of *Trethewy* v. *Illesdon*, 2 Vent. 141, does. Many are the instances where the penalties of bonds are put into very strange and even false Latin, and yet hold good. See 1 Salk. 162; 3 Salk. 71. The case in question is the case of a bargain and sale, and therefore to be interpreted more favorably than a deed. By the common law, nothing passed by deed of bargain and sale but the use, and the remedy was only in chancery; but now Statute-law has passed the estate to the use. The intention of the deed is plain, if this deed do not make Lord Say grantor, as to

him it would have no effect at all, who yet sealed it. According to the common rules of indenture, the words of the deed are the words of all the parties, but Lord Say is a party, therefore he has granted.

The truth of the matter was, that it being feared this slip in the deed would be fatal to the recovery, this other contrivance of the fine was judged to be the best way of supporting it.

Though the opinion of the court was clear and plain for the plaintiffs in both points, yet the Lord Say and Seal prayed a bill of exceptions.[1]

CATLIN *v.* WARE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1812.

[*Reported* 9 *Mass.* 218.[2]]

THIS was a writ of *dower*, to which the tenant pleaded in bar: — 1st That the demandant's husband Joseph Catlin was never seised, &c. on which issue was joined. 2d That the said Joseph, being seised in his demesne as of fee, on the 28th day of March, 1793, by his deed of that date duly acknowledged, &c., for a valuable consideration, bargained and sold the same land, in which the demandant claims her dower, to one David Horton in fee simple; and that the said Abigail, by the consent of her husband, for the consideration in the said deed expressed, and also of one dollar paid her by the said David, assented and agreed to the same deed of the said Joseph, and then and there by her act and consent, signified by her affixing her seal to the said deed, and subscribing her mark thereto, she being unable to write her name, barred herself of all right of dower in the same premises and every part thereof; by virtue whereof the said David became seised in fee of the same premises, free and exempt from all claim demand or right of dower of the said Abigail therein.

The demandant replied, that she did not by her act and consent signified, &c., bar herself, &c., and tendered an issue to the country, which was joined by the tenant.

The several issues thus joined were tried at the last April Term of this court in this county, before *Sedgwick*, J., from whose report it appears, that the seisin of the demandant's husband and her coverture were agreed, as alleged in the writ.

The tenant produced the deed of Joseph Catlin to David Horton, mentioned in the pleadings. It purported a conveyance in fee of the land, in which dower is demanded, and to it, after the name and seal of her husband, were set the demandant's seal and mark. But her name was not otherwise mentioned in the deed, nor were there any words therein purporting or implying a release of her right of dower. The deed was acknowledged by the husband, and recorded; but there was no acknowledgment by the wife.

[1] See *Dart* v. *Clayton*, 4 New R. 221.

[2] Part of the case is omitted.

On the part of the tenant it was insisted at the trial, that the latter issue was proved on his behalf. But the judge directed a verdict on both issues in favor of the demandant; referring to the decision of the court, the question whether that direction was right.

Bliss, for the tenant.

Ashmun, for the demandant.

CURIA. Two objections, made to the deed read in evidence at the trial of this cause, have been replied to by the counsel for the tenant.

As to the second, the want of an acknowledgment by the wife, we think an acknowledgment unnecessary in the case. One party to a deed acknowledging it gives notoriety to it, and that is the whole that is necessary. Though a deed be acknowledged and recorded, yet on the issue of *non est factum* the execution of the deed is still to be proved, as if it had not been acknowledged. *Inhabitants of Worcester* v. *Eaton*, 11 Mass. R. 379; 13 Mass. Rep. 371. Neither was an acknowledgment by the wife necessary in order to make the deed binding on her. She must know her own acts, and is bound by such, as the law authorizes her to execute.

The other objection to this deed has much more weight in it, and is indeed fatal to the defence of the action. A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case, whatever may be conceived of the intention of the demandant in signing and sealing the deed, there are no words implying her intention to release her claim of dower in the lands conveyed which must have been, to give it that operation. It was merely the deed of the husband, and the wife is not by it barred of her right to dower.[1]

AGRICULTURAL BANK OF MISSISSIPPI *v.* RICE.

SUPREME COURT OF THE UNITED STATES. 1846.

[*Reported* 4 *How.* 225.[2]]

ERROR to the Circuit Court of the United States for the Southern District of Mississippi. The opinion of the court presents the necessary facts and the questions decided.

Mason (Attorney-General), for the plaintiff.

Johnson and *Crittenden*, contra.

TANEY, C. J., delivered the opinion of the court.

This being an action of ejectment, the only question between the parties is upon the legal title.

It is admitted in the exception, that Mary Rice and Martha Phipps, lessors of the plaintiff, were each of them, as heirs at law of Adam

[1] *Quaere*, reluctantly, on the ground of established custom in New Hampshire. *Jackson* v. *Smith*, 27 N. H. 302 (1854).

[2] This case is printed from Mr. Justice Curtis's edition of the Reports of Decisions in the Supreme Court of the United States.

Bower, entitled to an undivided third part of the premises mentioned in the declaration, in fee-simple. In order to show title out of them, the plaintiffs in error relied upon the bond of conveyance and deed, mentioned in the statement of the case, both of which were signed and sealed by these lessors of the plaintiff, but were executed while they were *femes covert*.

As regards the bond, it would not have transferred the legal title, even if all the parties had been capable of entering into a valid and binding agreement. But as to the *femes covert* who signed it, it was merely void, and conferred no right, legal or equitable, upon the obligees.

The deed, also, is inoperative as to their title to the land. In the premises of this instrument, it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees, of the other part, — the husbands and the grantees being specifically named; and the parties of the first part there grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors; and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. The deed in question conveyed the marital interest of the husbands in these lands, but nothing more.

It is unnecessary to inquire whether the acknowledgment of the *femes covert* is or is not in conformity with the Statute of Mississippi. For, assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void.

The judgment of the Circuit Court is therefore affirmed.[1]

[1] So accordingly, *Peabody* v. *Hewett*, 52 Me. 33, 49, 50 (1861); *Harrison* v. *Simms*, 55 Ala. 510 (1876); *Adams* v. *Medsker*, 25 W. Va. 127 (1884); and cf. *Flagg* v. *Bean*, 25 N. H. 49, 62, 63 (1852), doubting *Elliot* v. *Sleeper*, 2 N. H. 525 (1823).

A deed purporting to be a conveyance of land by Edward Jones, and acknowledged by him to be his deed, passes his interest in the land, although the signature thereto reads "Edmund Jones." So said by the Supreme Court of California in *Mahlstedt* v. *Findla*, 25 Cal. 76 (1864).

But in *Boatbrough* v. *Eagles*, 23 Mich. 19 (1871), the plaintiff in ejectment, to prove the transfer of the title to the *locus* from Hiram Sherman, a former holder, to one Rawles, under whom the plaintiff claimed, offered in evidence an office copy of a deed which purported to be a conveyance of the land from Hiram Sherman to said Rawles, and which Hiram Sherman had acknowledged to be his deed, but the signature to which read "Harmon Sherman." The court rejected the deed, and the plaintiff alleged exceptions, which were overruled by the Supreme Court of Michigan, the court holding that the deed was not admissible, at least until some "foundation had been laid to connect the two variant names."

Note on Seals. — Most of the cases on seals have arisen on deeds for other purposes than the conveyance of land. But the principles are the same. See an article on Seals, 1 Am. Law Rev. 638.

In *Perrott* v. *Lovell*, 8 Hen. IV. 8 (1406), "*Tyrwhitt*, I put it to the court, that although twenty be named in a deed, if it be sealed by one seal, the deed is good. And the court does not say the contrary." See Fitz. Ab. Feoffments, 105.

"And the *Case of Inconmerris* was cited (but I remember not to what purpose). The Mayor and Commonalty of Inconmerris were patrons of a chantry; and they and the chantry priest made a lease for years by indenture, in the end of which was this clause: *In cujus rei testimonium*, *cest* the priest, *quam* the Mayor and Commonalty have put their common seal, and it was moved that there was not any seal for the priest, for he could not have a common seal with the Mayor and Commonalty. Cheyne [B.]. Twenty men may seal with one seal, and they may also seal with one seal upon one piece of wax only, and that shall serve for them all, if they all lay their hands upon the seal together. Manwood [C. B.]. They may all seal with one seal, not upon several pieces of wax. Gent [B.]. When many are parties to a deed, the words are *sigilla nostra*, which cannot be aptly said in this case, where all seal upon one piece of wax." — *Leighton and Butler's Case*, 2 Leon. 21 (1587).

Ball v. Dunsterville, King's Bench, 1791 (4 T. R. 313). — This was an action on a bill of sale; and the declaration stated that by a certain bill of sale made by the defendants, sealed with the seal of one of them for and on behalf of himself and the other, and by the authority of the other, &c. Plea, *Non est factum*. At the trial at the last Exeter Assizes before *Perryn*, B., it was proved that one of the defendants, in the presence of the other and by his authority, executed the instrument for them both, they being partners in this transaction; but there was but one seal, and it did not appear that he had put the seal twice upon the wax. It was objected on the part of the defendants that the instrument was not properly executed, for that they (not being a corporation) could not have a common seal; that the execution by one could not operate as an execution by both, even though they both consented; and that the authority given by one to the other to execute a deed should itself have been conferred by deed. The learned judge overruled the objection, and the plaintiff obtained a verdict; to set aside which a rule was obtained in the last term.

Bearcroft and *Lawrence*, Serjt., now showed cause; and relied upon *Lord Lovelace's Case*, Sir W. Jones, 258, where it was said [by *Noy*, A.-G.] that "if one of the others of the trust put one seal to the rolls by assent of all the vendors, and other others, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all." And they observed that this was a stronger case, because this instrument was executed by one defendant in the presence of the other. But even if it were necessary that the one who did execute should have affixed the seal twice to the wax in order to execute for himself and his partner, it did not appear negatively that it was not done in this case.

Erskine, *Leeds*, Serjt., and *Gibbs*, *contra*, said, that though the defendant, who executed the deed, might have executed for himself and his partner, by putting the seal on the latter's, yet that he could not equally have executed it twice, first for the one and then for the other; whereas here, he had only executed and delivered it once, which could not be taken to be the execution of both. But

The Court were clearly of opinion that there was no ground for the objection; that no particular mode of delivery was necessary, for that it was sufficient if the party executing a deed, treated it as his own. And they relied principally on this deed having been executed by one defendant for himself and the other *in the presence of him also*.

Rule discharged.

"In *Sprange* v. *Barnard*, 2 Bro. C. C. 585, a *feme covert* had a power of appointment over personalty by *will*, to which by the words of the power a *seal* was required.[1] She first wrote her will on unstamped paper, and then thinking it to be material that her will should be upon stamps, she wrote it on stamped paper, and afterwards tied the two papers together with a wafer, and had it witnessed according to the power. And Lord Kenyon [Sir Richard Pepper Arden. See 1 Am. Law Rev. 640, note], then Master of the Rolls, held the stamp to be equivalent to a seal, without having, besides, recourse to the wafer, which annexed the stamped paper to the former. The Statute of 1 Vict. c. 26, however, renders a seal no longer necessary, although expressly required, but substitutes for the solemnities annexed to the execution of the power a signature and two witnesses (§ 10). Upon the question decided in *Sprange* v. *Barnard*, independently of the Statute, it may be doubted whether either the stamp or the wafer could consistently be deemed a seal within the meaning of the power. The stamp is a mere regulation of the revenue to prevent fraud; and it has been very properly determined that the revenue laws ought never to be held to operate beyond their direct and immediate purpose, to affect the property, and vary the rights of parties, not within the intention of the Act. *Buckmaster* v. *Harrop*, 7 Ves. 345. The wafer was merely to keep the two papers together. Neither the stamp nor the wafer was affixed with an intention to *seal* the will. Sealing is essential to a *deed*: and it is quite clear that neither the stamps on the parchment nor the annexation of the deed by means of a wafer to another deed, would be equivalent to sealing. And when sealing is required to an instrument executing a power, it must be understood to mean such a sealing as is required, where a seal is by law essential. This is clearly proved by the cases before mentioned as to the execution of wills. But sealing is a solemnity which by this decision may be completely evaded. The principle applies equally to a *deed* executing a power as to a will. Now the common law will not inquire into the consideration of a *deed*, because of the solemnity and deliberation with which it is perfected. For, first, there is the determination of the mind to do it, and upon that the party causes it to be written, which is one part of the deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed, which is the consummation of his resolution. Plowd. 308. This shows the importance which the common law attaches to the ceremony of sealing. But it is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used, be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient; and therefore where the instrument is a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper. This, I am told, Lord Eldon decided when in the Common Pleas. But in *Sprange and Barnard*, Lord Kenyon rested his decision on the single circumstance of the instrument being upon stamps." —*Sugden, Powers* (8th ed.), 231.

In *The Queen* v. *St. Paul, Covent Garden*, Queen's Bench, 1845 (7 Q. B. 232), it was made a question, in the Court of Quarter Sessions, whether an order was under the seal of two justices. "On inspecting the said order, it appeared to the court not to be under the seals of the said justices; and the respondents were called upon to show when and how certain impressions in ink which were to be observed near the respective signatures of the said justices were placed on the said order. The attorney for the respondents was thereupon called as a witness; and on his evidence it appeared to the

[1] "This is according to Mr Brown's report, and he could scarcely have inserted the words by mistake; but as the case stands in Lib. Reg. it was a power by any writing under her hand and seal, attested, &c., 'or by her will in writing, or any writing purporting to be her will.' No solemnities appear to have been required to the execution of the power by will. And if this were so, the question must have been whether the ceremonies prescribed in the clause applied to a will as well as to a writing under hand and seal, and if they did not, which appears to be the true construction, a seal was not necessary. Reg. Lib. B. 1788, fo. 854."

that the form of order used in this case was a printed form; that the parish officers of St. Martin in the Fields employ a printer to print from time to time a large number of such forms; that on each sheet of such large number of forms a sufficient space is left for two marks in ink, which are so impressed by means of wooden blocks; and that such impressions, when so made at the foot of blank printed forms of orders of removal, are intended to serve as seals for the justices who may sign such orders. Each impression in this instance was so made, before the sheets of paper had been sent to the parish officers of St. Martin in the Fields by the printer and stationer, and they were in the same state on the order when it was made as they were in when it was produced at the sessions. The impressions represent an upright figure of St. Martin sharing his cloak with a beggar, and are of the size of an ordinary seal. The court, after hearing the evidence on which these facts appeared, held that the impression in ink made by such blocks was a sufficient seal to make the order, when signed and delivered by the justices, a good and valid order." In the Court of Queen's Bench, on appeal, upon *Pashley* arguing, that there was no legal seal on the order, Denman, C. J., said: "We do not wish to encourage the slightest doubt on this last point" (page 239).

In re Sandilands, Common Pleas, 1871 (L. R. 6 C. P. 411). — A special commission was issued for taking the acknowledgment of a deed at Melbourne, by Sarah Lane Ada wife of Edward Newman Sandilands; Mary Elizabeth, the wife of Robert John Amies; Anne Brierly, the wife of Sidney Smith; and Fanny, the wife of Albert Vines, devisees under the will of John Mayer, deceased. The deed when sent out had pieces of green ribbon attached to the places where the seals should be, but no wax; and, when returned executed by the several parties, it was in the same condition.

The attestation was in the usual form, "Signed, sealed, and delivered" by the within-mentioned parties: one of the attesting witnesses being the Mayor of Melbourne, whose official seal was affixed thereto. The certificate of two of the commissioners also stated that the married women appeared personally before them and produced the indenture before them, "and acknowledged the same to be their respective acts and deeds." In all other respects the documents were complete.

R. G. Williams moved that the indenture, special commission, certificate of acknowledgment, notarial certificate, and declaration, be received and filed among the records of that court by the proper officer for that purpose, pursuant to 3 & 4 Wm. 4, c. 74.

Bovill, C. J. I think there is *prima facie* evidence that this deed was sealed at the time of its execution and acknowledgment by the parties. To constitute a sealing, neither wax, nor wafer, nor a piece of paper, nor even an impression, is necessary. Here is something attached to this deed which may have been intended for a seal, but which from its nature is incapable of retaining an impression. Coupled with the attestation and the certificate, I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer, pursuant to the Statute.

Byles, J. I am of the same opinion. The sealing of a deed need not be by means of a seal; it may be done with the end of a ruler, or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed, and delivered by the several parties; and the certificate of the two special commissioners says that the deed was produced before them, and that the married women "acknowledged the same to be their respective acts and deeds." I think there was *prima facie* evidence that the deed was sealed.

Montague Smith, J. Something was done with the intention of sealing the deed in question. I concur in granting this application, on the ground that the attestation is *prima facie* evidence that the deed was sealed, and that there is no evidence to the contrary.

Rule granted.

National Provincial Bank v. Jackson. Court of Appeal in Chancery, 1886 [33 Ch. Div. 1]. — Maria and Ann Jackson, on January 18, 1883, conveyed land owned by them to their brother, R. J. Jackson, and he, on the following day, deposited the deeds with the plaintiff as an equitable mortgage; absconds to absconded. On a bill by the plaintiff to enforce its security the defendants, Ann and Maria Jackson, produced two deeds dated the 18th of January, 1883, — which were found among Jackson's papers after he had absconded and of which they had known nothing, — whereby in consideration of natural love and affection for his sisters, the grantees, and of 10*l.* paid by each of them, R. J. Jackson purported to convey to them respectively the houses which had been by the above-mentioned indentures of the same date conveyed to him. These deeds were expressed to be signed, sealed, and delivered by R. J. Jackson, in the presence of W. R. Thompson, his clerk, and bore the signature of Jackson, but did not bear any seal or impression, but only the piece of ribbon to which the seal is usually affixed. The court held that these deeds were never executed.

Cotton, L. J., said: The defendants then contend, that the legal estate had become re-vested in them, and in support of this contention they produce two other instruments purporting to be reconveyances to them from their brother, and dated the 18th of January, 1883, the day before the charge to the plaintiffs. These instruments were not stamped until long after their date, and bear a stamp which denotes that for some reason or other the penalty was not enforced, as *prima facie* it would have been. This further is remarkable, that although these instruments are expressed to be signed, sealed, and delivered in the presence of the attesting witness, who was one of R. Jackson's clerks, there is no trace of any seal, but merely the piece of ribbon for the usual purpose of keeping the wax on the parchment. In my opinion the only conclusion we can come to is that these instruments were never in fact sealed at all. They were somehow or other prepared by R. Jackson, but never in fact executed by him in such a way as to reconvey the legal estate. It is said, and said truly, that neither wax nor wafer is necessary in order to constitute a seal to a deed, and that frequently, as in the case of a corporation party to a deed, there is only an impression on the paper; and *In re Sandilands*, Law Rep. 6 C. P. 411, was referred to, where an instrument had been forwarded from the colonies together with an official certificate of its having been duly acknowledged, and this was recognized by the court as a deed, although there was no seal but only the ribbon on it. That case is not now under appeal, but it is evident that the question was merely as to what was the true inference of fact, and although perhaps, having regard to the certificate, it was right there to hold that the deed had been sealed, here in my opinion it would be wrong to do so. It is true that if the finger be pressed upon the ribbon, that may amount to sealing; but no such inference can be drawn here, where the attesting witness who has given evidence recollects nothing of the sort, and when Jackson had already committed one fraud in the matter, and perhaps then intended another. The question is merely one of fact, and upon the evidence it is impossible to conclude that these instruments were ever executed as deeds so as to reconvey the estate. That the sisters knew nothing of them is immaterial, as it was at any time open to them to accept the benefits which passed to them thereby; but the conclusion I come to is that the instruments never were sealed.

Lindley, L. J., said: Then comes the question whether the reconveyances were executed by Jackson. That is a question not of law but of fact. There is no trace of a seal upon them. It is true that it is unimportant what a seal is made of, but there must be something in the nature of an impression on the deed to denote that it has been sealed. On a question of fact it is useless to cite cases. *In re Sandilands* was, I think, a good-natured decision, in which I am not sure that I could have concurred. The court allowed the deed to be enrolled, and the choice lay between sending the deed back to Australia, and enrolling it for what it was worth. I am not sure that in that case I could have come to the conclusion that the deed had been duly executed; but on the evidence in this case I certainly cannot come to that conclusion. These reconveyances, therefore, in my opinion, were worthless for protecting the sisters' interests.

In Virginia in 1791 it was held that a scroll was a seal. *Jones* v. *Lapsley*, 1 Wash. 32. But in 1798, in *Reed* v. *Bringier*, Id. 170, the Court of Appeal expressed an opinion that an instrument to which a scroll was attached was not to be considered a deed without a statement in the instrument that it was sealed, or by proof that the scroll was intended as a seal; and in *Connell* v. *Tate*, 7 Leigh, 301 (1836), under a Statute, Va. Rev. Code, 1819, c. 128, § 94, which provided that "any instrument, to which the person making the same shall affix a scroll by way of seal, shall be adjudged and taken to be of the same force and obligation as if it were actually sealed," it was expressly ruled "that a scroll must be recognized as a seal in the body of the instrument, in order to constitute it a deed," and this although the word "seal" was written in the scroll. (But an instrument purporting to convey land, having a scroll attached, and acknowledged by the grantor, was held to be a deed. *Ashwell* v. *Ayres*, 4 Grat. 286 (1848).)

A like decision under a similar Statute was made in Missouri. *Cottrell* v. *Hopkins*, 2 Mo. 22 (1828); and see *Taylor* v. *Glover*, 2 S. & R. 502.

In *Kirby* v. *Ohio*, 4 McCord, 207 (1827), it was held, on the other hand, that a scrawl with (L. S.) inside of it, placed on an instrument which did not purport to be sealed, was a seal, and that it might be shown by parol evidence that it was annexed by the grantor. See *Dutton* v. *Le Roy*, 3 Stewart, 349. *Taylor* v. *Glover*, *ubi supra*.

But it has been held in some other States that a scroll is not a seal, although the instrument bearing it purports to be sealed. *Warren* v. *Lynch*, 5 Johns. 239 (1810). *Hamblin* v. *Kinney*, 4 Vt. 471 (1832). *Douglas* v. *Oldham*, 6 N. H. 150 (1833).

In *Eaton* v. *Boston & N. Y. Central R. R. Co.*, 10 Allen, 251 (1865), a suit was brought in 1861 on a so-called bond of the Norfolk County Railroad Company, dated January 1, 1854. The instrument was printed, with the exception of the signatures of the treasurer and president, and a printed impression in the form of a seal was on it. The defendant pleaded the Statute of Limitations.

[illegible] The defendants interpose the Statute of Limitations as a bar to any right on the part of the plaintiffs to enforce the payment of these bonds. By the Gen. Sts., c. 155, actions of contract founded upon any contract or liability not under seal, except such as are brought upon a judgment or decree of some court of record of the United States, or of this or some other of the United States, shall be commenced within six years next after the cause of action accrues. Unless the exception as to contracts "under seal" applies to these certificates, they are clearly barred, as they became due and payable on the 1st of January, 1854, and no action was commenced within six years from that date. But the plaintiffs insist that the contracts they now seek to enforce are under seal, and so are embraced in the exception clause. The Rev. Sts. c. 120, § 1, have provisions similar to the Gen. Sts., and it is the former that are applicable to this case, if any, as the six years' limitation had taken effect before the Gen. Sts. went into operation. The character of these contracts in a legal point is to be determined by the law as it existed when the contracts were made. To decide what constitutes a contract under seal, as applicable to this case, we must resort to the common law doctrine as held in Massachusetts at that time, for we had then no Statute as to what should constitute seals in cases of personal contracts. We had a provision as to seals of the courts and public offices, where the same were required by law, declaring [illegible] that the word "seal" should be construed to include an impression of such official seal made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto. R. Sts. c. 2, § 6. This authority, confined as it was to courts and public offices, yet obviously contemplated something more than a printed impression upon the instrument made by the printer in connection with the printing of the blank writ or certificate. The common law doctrine as to a seal was, that there must be a wafer or wax, or some other tenacious substance capable of receiving the impression of a seal made upon it. [illegible] This was fully considered and settled in N. York, in the case of *Wheeler* v. *Leach*,

5 Johns. 239, and recognized in *Broward and Mercantile Bank* v. *Haight*, 3 Hill, 493, and other cases. The theory of the purpose of seals, as expounded by Kent, C. J., in *Warren* v. *Lynch*, was, that it required greater ceremony and solemnity in the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed.

So well settled has the law been in this respect that no one, we suppose, doubts as to the nature of the seals required upon contracts made by individuals. The practice that has recently prevailed of making a printed impression purporting to be a seal on contracts of corporations, as a substitute for the common law seal, has with us no legal foundation or authority, except so far as it has been sanctioned by our Statutes. The attempt to make a substitute for the common law seal in the present instance was a greater departure than that of impressing the actual seal of the corporation upon paper alone. This was the mere printing of a fac-simile of the seal at the same time and by the same agency as the printing of the certificates, to be afterwards signed by the president and treasurer. As to the seal, nothing was left to be done by the officers of the corporation, who alone were authorized to affix the corporate seal. This practice is certainly in derogation of the whole theory of sealing contracts. It was the fact that the obligor did two independent acts, first, that of signing, and secondly, that of sealing, that in the theory of the law gave so much more solemnity to the contract, and imported so much greater deliberation, and therefore entitled it to be enforced without any proof of a particular consideration or recital that it was for value received, as well as extended its vitality beyond the period of six years, and excepted it from the bar incident to all personal contracts which were merely signed by the promisor.

We were referred by the counsel for the plaintiffs to Sugden on Powers (8th edit. 232, as sustaining the form of seal here used; but upon examination of that treatise, we think it fails so to do. While the writer holds that it is not necessary to use wax or a wafer, though citing no authorities for this opinion, he clearly rejects the case of a seal impressed by blocks or types in connection with the printing of the instrument that is to be the contract when duly executed by the properly authorized officer of the corporation, stating that in the execution of a deed there are required three distinct acts: 1. The determination in the mind to do the act. 2. The signing of the instrument. 3. The sealing. As to the latter, he says: "If the seal, stick, or other instrument used, be impressed by the party on the plain parchment or paper with intent to seal it, it is clearly sufficient." This is undoubtedly a modification of the common law doctrine of a seal, as we have it in 3 Inst. 169, and as the same has been understood in this Commonwealth; but even this does not give validity to any such form of sealing as was adopted in these certificates. The statement of Mr. Sugden as to the presumption of a seal where it is recited in the deed to have been sealed, that it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper, if correct (but as to which we have the authority of Kent, C. J., citing Perkins, § 129, to the contrary, in the case of *Warren* v. *Lynch*, 5 Johns. 239), would not aid the present case, because here no presumption arises, as all that was done is visible to the eye and remains unchanged. If that which appears on the instrument is not a seal, we have no right to presume that the instrument was sealed.

The case of *The Queen* v. *St. Paul*, 9 Jur. 442; s. c. 7 Q. B. 232, cited by the plaintiffs, is in some respects more favorable to them, as the objection there taken to the seal was, that it was an impression made by means of a wooden block. That case arose upon an appeal from an order of certain justices, for the removal of one T. H. Other objections to sustaining the order were also taken, and they were held sufficient, irrespective of that as to the seal. As to that, the court say: "We do not wish there should be any doubt upon the point as to the validity of the seal. We seal in this way; but we hold the order bad on another ground." This was a judicial process, and the remarks as to the seal were with reference to judicial processes, and not applied to cases of personal contracts. We know that to some extent such practice has prevailed as to judicial processes in those States where the common law rule has been held strictly

as to the seals of individuals. We are also aware that in many of our sister States a different rule prevails as to what is necessary to constitute a sealed contract, from that which has been uniformly held in Massachusetts. In some of them this is founded upon Statute provisions, and in others upon long usage, recognized by judicial decisions. But, in the absence of any such Statute in force, the recital, whether made by a pen or types, does not change the character of the instrument from a simple contract to one under seal, or give it the legal effect of importing a consideration when none is expressed, or extending the Statute of Limitations from the period of six to twenty years. Such contract is entitled to all the binding effect upon the promisor that a contract not under seal has, and nothing more. In the present instance, the contract recites that it is given "for value received," and assumes in that respect the form of a promissory note rather than a bond.

The course of legislation fully confirms the opinion that this was the well understood law with us. It was because this was so that the various Statutes modifying our common law in this respect have been adopted; and the further inquiry is, whether, by force of any Statute, these certificates may be deemed contracts under seal. Clearly no such Statute existed at the time of their execution and delivery. The earliest Statute on the subject was that of 1855, c. 228. But that Statute was not retrospective, or applicable to instruments previously executed. It cannot be so construed as to affect contracts which were made before its enactment. *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139, and cases there cited. [*Contra*, *Osborn* v. *Kistler*, 35 Ohio St. 69.]

A "scrawl with an impression upon it, apparently spread with gum on its under side and affixed to the deed, by moistening the gum, without the addition of any wafer or wax," is a good seal. *Tucker* v. *Bertlett*, 5 Cush. 359 (1850). A piece of paper attached by a wafer is a good seal. *Price* v. *Lawson*, 53 Mo. 35 (1862). So it attached by sealing-wax, *Turner* v. *Field*, 44 Mo. 382 (1869). See *Bradford* v. *Randall*, 5 Pick. 496, 497.

An impression in the substance of paper with the seal of a corporation is a good seal, although there be no wax or other intervening substance. In *Corrigan* v. *Trenton Delaware Falls Co.*, 1 Halst. Ch. 52 (1845), the opinion of HALSTED, C., was as follows:

"I do not consider the decisions of the Supreme Court in reference to ink scrolls, as ruling this question. According to Lord Coke, a seal is wax with an impression, because wax without an impression is not a seal. '*Sigillum est cera impressa, quia cera sine impressione non est sigillum.*' It is clear that by this definition the impression makes the seal. It is true that if this definition is strictly taken, there must not only be an impression, but that impression must be made on wax. But the impression is the *sine qua non* of Lord Coke's seal; the wax is only auxiliary; it adheres to the paper and receives the impression, and is the material which annexes the impression to the instrument. But we have long since grown out of the substance or essence of Lord Coke's definition, the impression; the question is, are we yet fast in the wax?

"We have said by long practice, that both these were not necessary. With which of them would Lord Coke have been the better satisfied? Clearly with the impression; nay, he would not have dispensed with that at all. What proportion of the seals used on private papers nowadays would fall within his definition? A wafer placed at the end of the name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal; and by the same rule or reasoning of absence of reasoning, a drop of sealing-wax dropped in proper position in relation to the name, and without impression, or bit of paper upon it, would be a seal; provided the writing called for a seal. Lord Coke's definition has been entirely departed from, and the mere wax or wafer, put on to receive the seal, is recognized as the seal. How can it be said that the impression, the essence of the definition, appearing on the paper, is no seal, because it is impressed without wax? Chief Justice Kent, in the case of *Warren* v. *Lynch*, 5 John. Rep. 239, 241, holds that an ink scroll is no seal, says, 'The law has not, indeed, declared of what precise materials the wax shall consist, and whether

it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is, perhaps, not material.' Is any such matter material then, if the seal can be impressed without it? In the above cited case, Chief Justice Kent says, 'The scroll has no one property of a seal.' It is evident from this that he does not consider a scroll as an impression; and here there is a distinction between the case of *Warren* v. *Lynch* as to scrolls, and the like decisions of our Supreme Court, and the case before us; for here the impression appears, and it is the impression of the corporate seal, the known, recognized and distinctive seal of the party executing the paper. If wax without the impression of a distinctive seal has come to be a seal, I do not see why the impression of a distinctive seal on the paper itself should be rejected as no seal, simply because it is made to appear on the paper without wax.

"Perhaps as succinct and sensible an account of the ancient use of seals as is to be found, is that given in 1 Morgan's Essays, 83. It is there said, 'The seals of private persons are not full evidence by themselves, for it is not possible to suppose these seals to be universally known, and consequently they ought to be attested by something else, *v. g.*, by the oath of some that have knowledge of them [that is, knowledge that the person whose seal it purports to be, uses that seal]; and when these seals are thus attested, they ought to be delivered in to the jury, because, though part of their credit arises from the oath that gives an account of their sealing, yet another part of their credit arises from the distinction of their own impression; for certainly every family had its own proper seal, as it is now in corporations. By this they distinguished their manner of contracting one from the other, and by false impressions of the seals they discovered a counterfeit contract; and therefore it was not the oath, but the impression of the seal accompanying it, that made up the complete credit of the instrument. But since, in private contracts, the distinction of sealing is in general worn out of use, and men usually seal with any impression that comes to hand, to be sure, there must be evidence of putting the seal; because, at this day, little can be discovered from the bare impression.' This is, of course, spoken of private seals, as now used, and not of corporate seals.

"In 1805, Justice Livingston, in delivering the opinion of the court in *Meredith* v. *Hinsdale*, 2 N. Y. Term Rep. 362, holds this language: 'However ancient the use of seals as a mark of authenticity to instruments may be, or to whatever cause their origin may be ascribed, it is certain that, in modern times, a private seal is not regarded as evidence of truth, or of belonging to the party to whose signature it is affixed; but that men promiscuously use each other's seals, without attention to the impression or coat of arms. Thus it is no uncommon thing to see a seal containing the device, arms, and perhaps name of one person used to authenticate the instrument of another. If it be not necessary, then, that in sealing a deed, the grantor should affix his own, but may adopt the seal of a stranger, why should it be expected that the materials on which the impression is made should be of wax, wafer, or of any other particular composition? Why should not any impression or mark answer as well as the common mode of sealing, provided it be durable, whether it be stamped on the paper itself, or on something laid upon it, if it be made as a solemn act of confirmation and deliberately acknowledged as the seal of the party making it?' But the cause was decided on another point. The instrument being made in Pennsylvania, where a scroll is recognized as a seal, the court in New York treated it as such, adopting the law of the place of the contract. At this time Kent was Chief Justice, and Thompson, Livingston, Spencer, and Tompkins, justices.

"Five years afterwards, the question came up again before the Supreme Court of New York, in the case of *Warren* v. *Lynch*, 5 John. Rep. 238. Kent, Chief Justice, and Justices Thompson and Spencer, were still on the bench, and the places of Justices Livingston and Tompkins had been supplied by Justices Van Ness and Yates. The question in this case arose on a paper writing in other respects in the form of a note, concluding, 'Witness my hand and seal,' signed by the maker, with the letters L. S. enclosed in an ink scroll, placed at the end of the name, where a seal is usually affixed to sealed instruments. The question was, whether by the laws of New York,

this was a sealed instrument. The opinion was delivered by the Chief Justice. Before proceeding to examine the question, he takes occasion to say that what was said by Justice Livingston, in *Meredith* v. *Hinsdale*, in reference to the ink scroll, was his own opinion, and not that of the court. He then says that the object in requiring seals to be proved, was misapprehended by President Dunkerton and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name; for one person might use another's seal. The policy of requiring seals consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed. Now these two ideas are not at all opposed to each other; the reason may be, as Chief Justice Kent states, to give ceremony and solemnity, and yet the seal might, and no doubt did, in ancient times, help to designate the person who affixed it to his name. The expression, 'One person might use another's seal,' is proof that in ancient times, before chirography became general, some had their distinctive seals, and that the seal helped to designate the person who affixed it to his name; and if it were not so, why the ancient idea of giving sealed instruments to the jury?

"A word as to the solemnity spoken of by Chief Justice Kent. Does it consist in the mere symbol? Is there any more solemnity in a bit of wafer than in a scroll made with a pen? The feeling of solemnity, if any, attending the execution of a sealed instrument, arises from a sense of the effect of the instrument, and not from the symbol used to characterize it as a sealed instrument; and as to the remark of the court, that to adopt a scroll for a seal would be to abolish all distinction between writings sealed and writings not sealed, I apprehend, with great respect, it was not well considered. Our Statute authorizing a scroll for a seal to money bonds, has had no such effect, and, on the principle above stated, could have no such effect.

"Instruments are now proved by proving the putting of the seal, by producing the subscribing witness, who swears to the signature, and the acknowledgment of the seal. The seal may be wax or wafer, without paper or with, and without impression, and the same man may use, as a seal, one thing to-day, and another to-morrow. As seals are used now, there seems to be no good reason why I may not affix a scroll, and acknowledge that to be my seal.

"But it is not necessary, on this occasion, to come in conflict with the decisions of the Supreme Court as to ink scrolls. I am of opinion that the impression of a distinctive corporation seal, on an instrument calling for the seal of the corporation, is a lawful seal."

See also *Allen* v. *Sullivan R. R. Co.*, 32 N. H. 446 (1855); *Hendee* v. *Pinkerton*, 14 Allen, 381 (1867); *Royal Bank of Liverpool* v. *Grand Junction R. R. Co.*, 100 Mass. 444 (1868). As to the seal of a court, see *Pillow* v. *Roberts*, 13 How. 472. In *Follett* v. *Rose*, 3 McL. 332, 335 (1844), it was said by McLEAN, J., "Wax or wafer is not essential, or a scrawl, to make a seal. An impression on the parchment or paper, with an intent to make a seal, is sufficient." But see, *contra*, *Bank of Rochester* v. *Gray*, 2 Hill, 227 (1842); *Farmers' Bank* v. *Haight*, 3 Hill, 493 (1842).

In *Deming* v. *Bullitt*, 1 Blackf. 241 (1823), and *Armstrong* v. *Pearce*, 5 Harrington, 351 (1851), instruments purported to be sealed, but no seals were annexed. *Held* not to be deeds. It is possible that in these cases there might have been positive proof that seals were not affixed, but *semble*, the courts meant that the statement in the instruments that they were under seal did not raise a presumption that they were so.

Several persons may adopt the same seal as their seal. *Tucker* v. *Bartlett*, 5 Cush. 459 (1850). *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35 (1873). *Lunsford* v. *La Motte Lead Co.*, 54 Mo. 426 (1873).

On Statutes in the United States concerning seals, see Stimson, §§ 1564, 1565.

SECTION II.

DELIVERY.

NOTE. — *T.* v. *K.*, Y. B. 10 Hen. VI. 25. John T. brought an action of debt on three obligations against one K.

Newton [for the defendant]. We say that the deeds on which the plaintiff has conceived his action were written and sealed by the defendant, and the defendant delivered them to H. E. as three writings, to wit, if the plaintiff should make a defeasance on a certain condition, and deliver it to the said H. E. to deliver to the defendant, and also that if the son of the plaintiff should make a release to the plaintiff of all manner of actions, and deliver the said release to the said H. E. to deliver to the defendant, then the said H. E. should deliver to the plaintiff the said escrows as deeds; and we say that neither the defeasance nor the release was made or delivered to the said H. E., and afterwards the plaintiff took the escrows out of the possession of the said H. E. So they are not the deeds of the defendant. Ready.

Fulthorpe [for the plaintiff]. You see how the defendant has acknowledged by his plea, that he made the said obligations, and delivered them to H. E. to deliver to the plaintiff, so he has acknowledged the obligations to be deeds and to the matter alleged by him no law obliges us to render judgment. And we pray our debt and damages &c.

PASTON [J.]. The plea is good enough; for if I bind myself by a writing, it is not my deed, because it is not *cãe* [*?*] to another man, and I seal the said writing without livery, if afterwards he gets the said writing it is not my deed, because it is but an escrow, until livery be made to him. So in this case when the condition is not performed, there must be livery. Wherefore, &c.

STRANGEWAYS [J.]. The case that you have put is not like this case, for in your case no livery was ever made, but in this case livery was made to H. E. on condition to deliver to the plaintiff; then notwithstanding that the condition be not performed, he cannot avoid the deeds which he has acknowledged by such condition without specialty. Wherefore, &c.

PASTON [J.]. If I make a deed for twenty pounds to James Strange, and I deliver the said deed to another as an escrow, then if Strange gets the deed afterwards, and brings an action against me, I may well say it is not my deed, because no livery was ever made that Strange should have the deed; so in this case when the condition is not performed, they are not the deeds of the defendant, because the deeds were delivered to the said H. E. as three escrows, unless the conditions were performed. Wherefore, &c.

COTESMORE [J.]. In your case no livery was ever made, to wit: that he to whom the obligations were made had livery of the said deeds; but in this case they were delivered to this said H. E. to deliver to the plaintiff on the conditions *ut supra*. Then if H. E. had delivered the deeds against the conditions, he is chargeable to the defendant by writ of detinue. Wherefore, &c.

Newton demurred in law that the plea was good. And demanded judgment, if the action, &c.

Fulthorpe did not dare to demur, but said that they were deeds. Ready, *et cetera contra*.

DEGORY AND ROE'S CASE.

COMMON PLEAS. 1589, 1591.

[*Reported* 1 *Leon.* 152.]

DEGORY brought debt upon an obligation against Roe, as heir to his ancestor. The defendant pleaded, That his ancestor by his deed did covenant with Sir W. Winter and A. Marsh, to stand seised to the use of himself for life, and afterwards to the use of the defendant and his heirs, and so he had nothing by descent. The plaintiff *replicando* said, *Non concessit*; and it was found by special verdict that such a deed of covenant was made by the ancestor of the defendant, but the first use was limited to the covenantor and his wife, for their lives, &c., and that he delivered the same to I. S. as his deed, to the use of the said Sir W. Winter and the said Marsh, if the said Sir W. Winter would agree to the same, and take the charge of it upon him, and if he will not agree, that then it should not be his deed, and further found, that Sir W. Winter died before any agreement; and it was moved by PERIAM [J.], If the same be presently the deed of the ancestor, or if it do not take effect till the condition be performed, *scil.*, until Sir W. Winter hath agreed to it. See 14 H. 8, 17, 18, 19, 20, 23. And by WALMESLY [J.], The same is not the deed of the ancestor until Sir William hath agreed; but by ANDERSON [C. J.] and PERIAM [J.], Although Sir William Winter doth not agree to it, yet it is the deed of Roe: for although a deed be upon condition, *ut supra*, yet because he delivered it as his deed, and the condition is subsequent to it, it shall be taken for his deed, and the condition after shall be void, because repugnant: for although that in estates limited to men, the estate may be precedent, and the condition subsequent, and the not performance of the condition may destroy the estate, for the estate is always subject to the condition, yet it is not so in deeds, for being once the deed of the party, it can never cease to be his deed, after it is once delivered as his deed. OWEN [J.], Although the same be the deed of the party, yet it is not well pleaded: and he conceived the issue is found against him, for the covenant is pleaded, to stand seised unto the use of himself for life, the remainder over: to which the plaintiff *replicando* saith, *Non concessit*; so as the issue is, if any such deed of covenant was, and the jury find, That the covenant was to stand seised to the use of himself, and his wife, &c., so as it is not such a deed as the defendant hath pleaded, for other estates are limited by it, and therefore it shall not be intended the same deed. PERIAM [J.], The same is not material, for the substance of the plea is, nothing by descent, &c., and it was adjourned.

[Leonard reports the case as of Trinity Term, 31 Eliz. Under Hilary Term, 33 Eliz., Moore, page 300, *sub nom.* *Degoze* v. *Rowe*, gives the conclusion of the case as follows: —]

And the judges adjudged with the plaintiff, namely, that the father *non convenit;* the reason was because the agreement of Sir William Winter is condition precedent to the essence of the deed, and it is not like where a deed is delivered to one to the use of another: there if the other dies before disagreement, or notice, the deed is good, because there is no condition, but in the principal case the condition by the circumstances is precedent.

WHYDDON'S CASE.

COMMON PLEAS. 1596.

[*Reported Cro. El.* 520.]

ANNUITY. The defendant saith, that he delivered the deed of annuity to the plaintiff as an escrow, to be his deed upon a certain condition to be performed, otherwise not: and that the condition was not yet performed. The plaintiff demurred: and, without argument, adjudged for the plaintiff: for the delivery of a deed cannot be averred to be to the party himself as an escrow. *Vide* 19 Hen. 8, pl. 8; 29 Hen. 8; and *Morice's Case*, Dyer, 34 b, 35 a, in margin.[1]

HAWKSLAND *v.* GATCHEL.

QUEEN'S BENCH. 1601.

[*Reported Cro. El.* 835.]

DEBT upon an obligation. The defendant pleads that he delivered that obligation to the plaintiff, as an *escrow* to be his deed, if he performed such a condition, viz., to permit him to enjoy such corn: and allegeth, that the condition was not performed, and so not his deed. And hereupon the plaintiff demurs. *Clerk*, for the plaintiff, argued, that one cannot deliver a deed to the party himself, to be an *escrow;* and to that purpose cited the 19 Hen. 8, pl.; 43 Edw. 3, pl. 28, where it is said, that this condition cannot be averred upon the delivery to the party himself, in avoidance of the deed, without showing a deed thereof. GAWDY. There is not any difference, where it is delivered to the party himself as *an escrow*, and where to a stranger: and the case of 19 Hen. 8, is so; because the deed was delivered to the party himself first, as his deed upon condition, &c., in which case the deed is absolute, and takes effect as his deed upon the first delivery: and it

[1] See *accord.*, *Williams* v. *Green*, Cro. El. 884; s. c. Moore, 642; *Thoroughgood's Case*, 9 Co. 136 b; 1 Gray, Cas. in Prop. 437; *Bushell* v. *Passmore*, 6 Mod. 217, 218; *Brennan* v. *Bingham*, 26 N. Y. 483.

cannot be avoided by the condition. But when it is first delivered as *an escrow*, although it be to the party himself, it is clear that it is not his deed until it be performed. And so is 29 Hen. 8, Dyer, 34, in *Morris and Leigh's Case*. Portham *accord.*; for if, upon the delivery, the words spoken by the obligor purport that it shall not be his deed, it is clear it is not: as where one causeth an obligation to be written and sealed in my name, and brings it unto me, and prays that I would deliver it as my deed, and I say, "Do you such a thing, and take it as my deed, otherwise not;" it is clear, that it is not my deed until the thing be performed. So if the obligor saith, "Take it to you, I will not deliver it as my deed:" it is not his deed. Wherefore in the principal case, when the obligation is delivered as *an escrow*, by express words, it is not possible that it should be his deed, for the words are not sufficient to make it so until the condition be performed. But if it be once delivered as his deed, it cannot afterwards be defeated by a condition, if the condition be not in writing; but here the condition is precedent, so as it was not his deed until it were performed, and therefore a conditional delivery may be averred without writing. Wherefore, &c. Fenner to the same intent: for although difference hath been taken, that a deed shall not be delivered to the party himself as *an escrow*, but to a stranger; and the reason hath been alleged, because when it is delivered to the party himself, there cannot be a second delivery, whereupon the writing should take his effect as a deed: that seemeth to be no difference: for when it is delivered to the party as *an escrow*, the words are not sufficient to make it to be his deed, until the condition be performed. Wherefore, &c. — And of that opinion was Clench. Wherefore it was adjudged for the defendant. *Vide ante*, 520, *Whyddon's Case*.[1]

Co. Lit. 36 a. If a man deliver a writing sealed, to the party to whom it is made, as an escrow to be his deed upon certain conditions, &c., this is an absolute delivery of the deed, being made to the party himself, for the delivery is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is only requisite, and then when the words are contrary to the act which is the delivery, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur*. And hereof though there hath been variety of opinions, yet is the law now settled agreeable to judgments in former times, and so was it resolved by the whole Court of Common Pleas. But it may be delivered to a stranger, as an escrow, &c., because the bare act of delivery to him without words worketh nothing. And this is the ancient diversity in our books, the record whereof I have seen agreeable with the reason of our old books. And as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery, as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Go and take

[1] See *Wilcock* v. *Hewson*, Moore, 696.

up the said writing, it is sufficient for you, or it will serve the turn: or, Take it as my deed, or the like words, it is a sufficient delivery.

Shep. Touch., 58, 59. The delivery of a deed as an escrow is said to be where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made. — The words therefore that are used in the delivery must be after this manner: I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you £20 for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this as an escrow to you, to keep until such a day, &c. upon condition that if before that day he to whom the escrow is made shall pay to me £10, or give to me a horse, or enfeoff me of the manor of Dale, or perform any other condition; that then you shall deliver this escrow to him as my deed. For if when I shall deliver the deed to the stranger, I shall use these or the like words; I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London; in these cases the deed doth take effect presently, and the party is not bound to perform any of the conditions. So it must be delivered to a stranger: for if I seal my deed and deliver it to the party himself to whom it is made as an escrow upon certain conditions, &c. in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions: for, *In traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur*. But in the first cases before, where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it, and laid it by me, and not delivered it at all: and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good. But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof disabled to make it. He therefore, that is trusted with the keeping and delivering of such a writing, ought not to deliver it before the conditions be performed; and when the conditions be performed, he ought not to keep it, but to deliver it to the party. For it may be made a question, whether the deed be perfect, before he hath delivered it over to the party according to the

authority given him. Howbeit it seems the delivery is good, for it is said in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good: for there was *traditio inchoata* in the life-time of the parties; *et postea consummata existens* by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery. And therefore if an infant, or woman covert, deliver a deed as an escrow to a stranger, and before the conditions are performed, the infant is become of full age, or the woman is become sole, yet the deed in these cases is not become good. And yet if a disseisee make a deed purporting a lease for years, and deliver it to a stranger out of the land as an escrow, and bid him enter into the land, and deliver it as his deed, and he do so, this is a good deed, and a good lease, so that to some purposes it hath relation to the time of the first delivery, and to some purposes not.

THOMPSON *v.* LEACH.

COMMON PLEAS, KING'S BENCH, HOUSE OF LORDS. 1690.

[*Reported* 3 *Lev.* 284.]

EJECTMENT upon the demise of Charles Leach, and on *Not guilty* and a special verdict, the case was thus: Simon[1] Leach being tenant for life [remainder to his first and other sons in tail[2]], remainder to his first son in tail, remainder to Sir Simon Leach in tail. Simon Leach makes a deed of surrender to Sir Simon before the birth of any son of Simon, and afterwards had a son, viz. Charles the lessor of the plaintiff. Simon keeps the deed of surrender in his hands, and Sir Simon had no knowledge of it until five years after the said son's birth. But as soon as he had notice of it, he accepted it, and entered on the lands; after which Simon dies, and Charles the son brings the ejectment: and whether the contingent remainder was destroyed by this surrender, was the question. And after divers arguments, POLLEXFEN, Chief-Justice, POWELL and ROKESBY, Justices, held, that the estate did not pass by the surrender until the acceptance of it: and for this they relied much on the constant form of pleading surrenders, wherein always the precedents are not only to plead the surrender, but also with an acceptance, viz., that the surrenderee agreed thereto, except one or two in Rastal: and divers other authorities were cited in the case *pro* and *con*, and that then the surrender not taking effect, nor the estate for life merged before the birth of the son, he had a good title. 2. The

[1] Levinz calls him "Nicholas," but the other reports show that his name was [illegible].

[2] This essential statement is accidentally omitted from Levinz's report.

said three judges held, that the acceptance afterwards should not so relate to the making of the deed, as to cause the estate to pass *ab initio*, and so by relation to make it a surrender before the son's birth, so as to destroy his estate; for that would be to make a relation work to the prejudice of a third person, and relations do always make acts good only between the parties themselves, but not to prejudice strangers, as Co. 3 Rep., *Butler and Baker's Case*. But Justice Ventris to the contrary held, that the estate vested immediately by the making the deed of surrender; but to be divested by the surrenderee's refusal to accept it afterwards, but that until such refusal the estate was in the surrenderee; and divers cases were cited on that side also: and he also held, that if it did not vest at the first by the delivery of the deed of surrender, yet by the acceptance afterwards it should be by relation a surrender from the beginning, and so destroy the contingent remainder to Charles the son born afterwards; and this relation does no wrong to a third person, for Charles was not a person *in esse* when the surrender was first made. But by the opinion of the other three judgment was given for the plaintiff, upon which error was brought in B. R. and in Hill. 3 W. & M. the judgment given in C. B. was affirmed by the whole court. But afterwards the defendant brought error thereof in the House of Peers; and in December, 1692, on hearing of the judges there, they all continuing in their former opinion (except Sir Robert Atkins, Chief Baron, and then Speaker of the House of Peers), the judgment was reversed by the Lords in Parliament, the said Sir Robert Atkins and Mr. Justice Ventris concurring with them as before.

Levinz, of counsel for the defendant.[1]

[1] The dissenting opinion of Ventris, J., in the Court of Common Pleas, which was afterwards adopted in the House of Lords, is thus given in his report of this case in 2 Vent. 198: —

"Upon this record the case is no more than this; Simon Leach, seised for life, remainder to his first son, remainder in tail to Sir Simon Leach. Simon Leach before the birth of that son by deed, sealed and delivered to the use of Sir Simon (but in his absence and without his notice) surrenders his estate to Sir Simon, and continues the possession until after the birth of his son; and then Sir Simon Leach agrees to the surrender, whether this surrender shall be taken as a good and effectual surrender before the son born.

"There are two points which have been spoken to in this case at the bar.

"First, whether by the sealing of the deed of surrender the estate immediately passed to Sir Simon Leach: for then the contingent remainder could not vest in the after-born son, there being no estate left in Simon Leach his father to support it?

"Secondly, whether after the assent of Sir Simon Leach, though it were given after the birth of the son, doth not so relate as to make it a surrender from the sealing of the deed, and thereby defeat the remainder which before such assent was vested in the son?

"I think these points include all that is material in the case, and I shall speak to the second point, because I would rid it out of the case. For as to that point I conceive, that if it be admitted, that the estate for life continued in Simon Leach till the assent of Sir Simon, that the remainder being vested in Charles the second son before such assent, there can be no relation that shall divest it.

"I do not go upon the general rule, that relations shall not do wrong to strangers,

JOHNSON *v.* BAKER.

King's Bench. 1821.

[Reported 4 B. & Ald. 440.]

Covenant. The declaration stated a deed between Richard Bulpin, of the first part; William Porter and the defendant, of the second part; George Colman and Edward Palmer, of the third part; and the plaintiffs and certain other persons, creditors of Richard Bulpin, of the fourth part; which recited that R. B. then carried on the business of a

"It is true, relations are favoured in law, which are always accompanied with equity. But it is also true, that there is sometimes loss and damage to third persons consequent upon them; but then it is what the law calls *damnum absque injuria*, which is a known and settled difference in the law, as my Brother Pemberton urged it. But I think there needs nothing of that to be considered in this point.

"But the reason which I go upon is, that the relation here, let it be never so strong, cannot hurt or disturb the remainder in Charles Leach in this case; for that the remainder is in him by a title antecedent and paramount to the deed of surrender, to which the assent of Sir Simon Leach relates, so that it plainly overreaches the relation.

"If an estate in remainder, or otherwise, ariseth to one upon a contingency or a power reserved upon a fine or feoffment to uses, when the estate is once raised or vested it relates to the fine or feoffment, as if it were immediately limited thereupon. 1 Co. 133. 156. So this remainder, when vested in Charles, he is in immediately by the will, and out of danger of his remainder being divested by any act done since, as the surrender is.

"I will put one case, I think full to this matter, and so dismiss this point.

"It cannot be denied, but that there is as strong a relation upon a disagreement to an estate, as upon an agreement, where the estate was conveyed without the notice of him that afterwards agrees or disagrees; if the husband discontinues the wife's estate, and then the discontinuee conveys the estate back to the wife in the absence of the husband, who (as soon as he knows of it) disagrees to the estate, this shall not take away the remitter which the law brought upon the first taking the estate from the discontinuee. And so is Lit. cap. Remitter, Co. 11 Inst. 356 b. The true reason is, because she is in of a title paramount to the conveyance to which the disagreement relates, though that indeed was the foundation of the remitter, which by the disagreement might seem to be avoided. This therefore I take to be a stronger case than that at the bar: so that if there were no surrender to Eve the birth of Charles the son, there can be none that by any construction of law; for that would be in avoidance of an estate settled by a title antecedent to such surrender, whereas relations are to avoid no estate, and I believe there has by no case yet upon relations that go any further, and it would be against all reason if it should be otherwise.

"But as to the first point, I am of opinion, that upon the making of the deed of surrender, the freehold and estate of Simon Leach did immediately vest in Sir Simon, before he had notice or gave his express consent to it; and as it was a surrender before Charles was born, and then the contingent remainder could never vest in him, there being no particular estate to support it.

"A surrender is a particular sort of conveyance that works by the common law. And as Lord Coke speaks, and I think I can make it plainly appear, that conveyances at the common law, as immediate upon the execution of them on the grantor's part) divest the estate out of him, and put it in the party to whom such conveyance is made, though

linen-draper, and was justly indebted to the persons named parties of the fourth part, in the several sums of money set opposite to their names at the foot of the deed; and that he being unable to pay them in full, it

in his absence, or without his notice, till some disagreement to such estate appears. I speak of conveyances at the common law; for I shall say nothing of conveyances that work upon the Statute of Uses, or of conveyances by custom, as surrender of copyholds, or the like, as being guided by the particular penning of Statutes, and by custom and usage, and matters altogether foreign to the case in question.

"In conveyances that are by the common law, sometimes a deed is sufficient (and so surrenders sometimes words without a deed) without further circumstance or ceremony, and sometimes a further act is requisite to give them effect, as livery of seisin, attornment, and sometimes entry of the party, as in case of exchanges; and as well in those conveyances that require a deed only, as those which require some further act to perfect them, so soon as they are executed on the grantor's part, they immediately pass the estate. In case of a deed of feoffment to divers persons, and livery made to one feoffee in the absence of the rest, the estate vests in them all till dissent, 2 Leon. 23, *Mutter's Case*. And so 223, an estate made to a feme covert by livery, vests in her before any agreement of the husband, Co. 1 Inst. 356 a. So of a grant of a reversion after attornment of the lessee, passeth the freehold by the deed, Co. 1 Inst. 49 a, Lit. sect. 66. In case of a lease, the lessee hath right immediately to have the tenements by force of the lease. So in the case of limitation of remainders and of devises (which though a conveyance introduced by the Statute, yet operates according to the common law), the freehold passeth to the devisee before notice or assent. I do not cite authorities, which are plentiful enough in these matters, because they that have argued for the plaintiff have in a manner agreed, that in conveyances at the common law, generally the estate passeth to the party, till he divests it by some disagreement.

"But 't is objected, that in case of surrenders, an express assent of the surrenderee is a circumstance requisite; as attornment to a grant of a reversion, livery to a feoffment, or execution by entry, in case of an exchange.

"To which I answer, that an assent is not only a circumstance, but 't is essential to all conveyances; for they are contracts, *actus contra actum*, which necessarily suppose the assent of all parties: but this is not at all to be compared with such collateral acts or circumstances, that by the positive law are made the effectual parts of a conveyance; as attornment, livery, or the like; for the assent of the party that takes, is implied in all conveyances, and this is by intendment of law, which is as strong as the expression of the party, till the contrary appears; *stabit præsumptio donec probetur in contrarium*.

"But to make this thing clear, my Lord Coke in his first Institutes, fol. 50, where he gives instances of conveyances that work without livery, or further circumstance or ceremony, puts the cases of lease and release, confirmation, devise and surrenders, amongst the rest; whereas if an express assent of the surrenderee were a circumstance to make it effectual, sure he would have mentioned it, and not marshalled it with such conveyances as I have shown before, need no such assent, nor anything further than a deed.

"The case of exchanges has been put as an instance of a conveyance at law, that doth not work immediately; but that can't be compared to the case in question, but stands upon its particular reasons; for there must be a mutual express consent, because in exchanges there must be a reciprocal grant, as appears by Littleton.

"Having, I hope, made out (and much more might have been added, but that I find it has been agreed) that conveyances work immediately upon the execution of them on the part of him that makes them, I will now endeavor to show the reasons, why they do so immediately vest the estate in the party without any express consent, and to show that these reasons do hold as strongly in case of surrenders, as of any other conveyances at law; and then consider the inconveniences and ill consequences that have been objected, would ensue, if surrenders should operate without an express con-

had been agreed to pay 12*s.* in the pound, in full discharge, to be secured as to 7*s.*, part of such 12*s.* in the pound, by bills drawn upon and accepted by William Porter and the defendant: and as to 5*s.* in the

[illegible] and to show, that the same are to be objected as to all other conveyances, and that very ill consequences and inconveniences would follow, if surrenders should be [illegible] an express assent of the surrenderee; and then shall endeavor to answer the arguments that have been made on the other side, from the putting of cases of surrenders in the books, which are generally mentioned, to be with mutual assent, and from the manner of pleading of surrenders.

"The reasons why conveyances do divest the estate out of the grantor, before any express assent or perhaps notice of the grantee, I conceive to be these three. —

"First, because there is a strong intendment of law, that for a man to take an estate it is for his benefit, and no man can be supposed to be unwilling to that which is for his advantage. 3 Rep. 14. Where an act is done for a man's benefit an agreement is implied, till there be a disagreement. This does not hold only in conveyances, but in the gift of goods, 8 Co. 26. A grant of goods vests the property in the grantee before notice. So of things in action; a bond is sealed and delivered to a man's use, who dies before notice, his executors may bring an action. Dyer, 16?. An estate made to a feme covert vests in her immediately, till the husband disagrees. So is my Lord Bishop, 2d, in *Steede and Hutton's Case*. Now is there not the same presumption and apparance of benefit to him in reversion in case of a surrender? Is it not a palpable advantage to him to determine the particular estate, and to reduce his estate into possession? and therefore, why should not his assent be implied, as well as in other conveyances?

"Secondly, a second reason is, because it would seem incongruous and absurd, that when a conveyance is completely executed on the grantor's part, yet notwithstanding the estate should continue in him. The words of my Lord Coke (1 Inst. 217 a) are, that it cannot stand with any reason, 'that a freehold should remain in a man against his own livery when there is a person able to take it.' There needs only a capacity to take, his will to take is intended. Why should it not seem as unreasonable, that the estate should remain in Simon Leach, against his own deed of surrender? For in case of a surrender, a deed, and sometimes words without a deed, are as effectual as a livery in case of a feoffment.

"Thirdly, the third and principal reason, as I take it, why the Law will not suffer the execution of a conveyance to be in suspense, and to expect the agreement of the party to whom 't was made, is to prevent the uncertainty of the freehold. This I take to be the great reason why a freehold cannot be granted *in futuro*, because that it would be very hard and inconvenient that a man should be driven to bring his *præcipe* or real action first against the grantor, and after he had proceeded in it a considerable time, it should abate by the [illegible] the freehold to a stranger, by reason of his agreement to some conveyance made before the writ brought; for otherwise there is nothing in the nature of the thing against conveying a freehold *in futuro*, for a rent *de novo* may be to granted; because that being newly created, there can be no precedent right to bring any real action for it. Palmer, 29, 30.

"Now in this case, suppose a *præcipe* had been brought against Simon Leach, this should have proceeded, and he could not have pleaded in abatement till Sir Simon Leach had executed; and after a long progress in the suit he might have pleaded, that Sir Simon Leach executed *puis darrein continuance*, and defeated all. So that the same inconvenience, as to the bringing of real actions, holds in surrenders, as in other conveyances.

"And to show that it is not a slight matter, but what the law much considers, and is very careful to have the freehold fixed, and will never suffer it to be in abeyance, or under such uncertainty, as a stranger that demands right should not know where to [illegible]

"A multitude of cases might be cited; but I will cite only a case put 1 H. 6, 2 a,

pound, by bills accepted by Colman and Palmer. It then set out a covenant by the defendant, to pay the said sum of 7*s.* in the pound at or upon the 4th day of April. Breach, that defendant did not pay.

because it seems something of a singular nature, lord and villain, mortgagee and mortgagor, may be both made tenants.

"But it will be said here, that if a *precipe* had been brought against Sir Simon Leach, might not he have pleaded his disagreement, and so abated the writ by non-tenure?

"It is true; but that inconvenience had been no more than in all other cases, a plea of non-tenure, and it must have abated immediately, for he could not have abated it by any dissent after he had answered to the writ. Whereas I have shown it in the other case, it may be after a long progress in the suit.

"Again, it 's very improbable that he should dissent; whereas on the other side, an assent is the likeliest thing in the world; so the mischief to the demandant is not near so great, nor the hundredth part so probable.

"Now I come to consider those inconveniences that have been urged that would ensue, if a surrender should work immediately.

"It has been said, that a tenant for life might make such deed of surrender, and continue in possession, and suffer a recovery; and this might destroy a great many recoveries, and overthrow marriage settlements, and defeat charges and securities upon his estate after such deed of surrender.

"These, and a great many more such like mischiefs, may be instanced in surrenders; but they hold no less in any other conveyance, whereby a man may (as has been showed before) divest himself of the estate, and yet continue the possession; and in this case the assent of the surrenderee, though he doth not enter, would (as it is agreed of all hands) vest the estate in him, Hutton 95, Br. tit. Surrender 50, though he cannot have trespass before entry, and that assent might be kept as private, and let in all the mischiefs before mentioned as if no such assent were necessary.

"And this I think sufficient to answer to the inconveniences objected on that side.

"Now let us see what inconveniences and odd consequences would follow, in case a surrender could not operate till the express assent of the surrenderee, then no surrender could be to an infant at least, when under the age of discretion; for if it be a necessary circumstance, it cannot be dispensed with no more than livery or attornment. So though an infant of a year old is capable to take an estate, because for his benefit he could not take a particular estate, upon which he had a reversion immediately expectant, because it must inure by surrender. If there be joint tenants in reversion, a surrender to one of them inures to both, 1 Inst. 192, 214 a, so there, as to one moiety, it operates without assent or notice.

"Suppose tenant for life should make livery upon a grant of his estate to him in reversion and two others, and the livery is made to the other two in the absence, and without the notice of him in reversion, should the livery not work immediately for a third part of the estate? And if it doth, it must inure as a surrender for a third part. So is Bro. tit. Surrender, and 3 Co. 76.

"If tenant for life should by lease and release convey the lands held by him for life, together with other lands to him in reversion who knows nothing of the sealing of the deed; should this pass the other lands presently, and the lands held for life not till after an express assent, because as to those lands it must work as a surrender? Plainly an express assent is not necessary. For if the grantee enters, this is sufficient.

"I come in the last place to answer those arguments that have been made from the manner of putting the case of surrenders in the book, and the form of pleading surrenders, Co. 1 Inst. 337 b.

"First, a surrender is a yielding up of the estate, which drowns by mutual agreement between them. Tenant for life, by agreement of him in reversion, surrenders to him;

ursuant to his covenants, the sum of 7*s.* in the pound, on the debt of Bolpin, to the plaintiffs. The defendant, after craving oyer of the deed, pleaded, first, *Non est factum*; secondly, that the deed was

he hath a freehold before he enters. And so Perkins, in putting the case of a surrender, mentions no agreement; and divers other books have been cited to the same purpose.

"To all which I answer:

"No doubt but an agreement is necessary. But the question is, whether an agreement is not implied when a deed of surrender is made in the absence of him in the reversion, whether the law shall not suppose an assent, till a disagreement appears?

"Indeed, if he were present, he must agree or disagree immediately; and so 't is in all other conveyances. The cases put in Perkins, sect. 607, 608, 609, are all of surrenders made to the lessor in person; for thus he puts them: The lessee comes to the lessor, and the lessee saith to the lessor, I surrender, saith he, if the lessor doth not agree, 'tis void; *Car il ne peut surrender a l'un sinonis son deuts*. And that is certainly so in surrenders, and all other conveyances; for a man cannot have an estate put into him in spite of his teeth.

"But I cannot find any of the books cited that come to this point, that where a deed of surrender is executed without the notice of him in reversion, that it shall pass nothing till he consents; so that it cannot be said, that there is any express authority in the case.

"Now, as to the form of pleading of a surrender it has been objected, that a surrender is always pleaded with acceptance; and many cases have been cited of such pleadings, Rastal's Entries 176, 177, Fitzh. tit. Barre 262, which are cases in actions of debt for rent, and the defendant in bar pleads, that he surrendered before the rent grew due, and shows, that the plaintiff accepted the surrender. So in waste brought, a surrender pleaded with the agreement of the plaintiff.

"These and the like cases have been very materially, and I think fully answered at the bar by my Brother Pemberton; that those actions being in disaffirmance of the surrender, and implying a disagreement, the defendant had no way to bar or avoid such disagreement, but by showing an express agreement before.

"The case of *Penwood Pendleton* in the 3 Cro. 161, that has been so often cited, is of the same sort: in a replevin the avowry was for a rent-charge; in bar of which 't is pleaded, that the plaintiff demised the land out of which the rent issued, to the avowant. The avowant replies, that he surrendered *dimissionem predict.* to which the plaintiff agreed. This is the same with pleading in bar to an action of debt for rent: but when the action is in pursuance of the surrender, then it is not pleaded.

"So is Rast. Entries 136. The lessee brought an action of covenant against the lessor, for entering upon him, and ousting of him. The defendant pleads a surrender in bar, and that without any agreement or acceptance.

"In Fitzherbert, tit. Debt 149, where the case is in an action of debt for rent; the defendant pleaded in bar, that he surrendered, by force of which the plaintiff became seised; there is no mention of pleading any agreement, notwithstanding that the action was to disaffirmance of the surrender.

"Therefore, as to the argument which has been drawn against the form of pleading, I say, that if an agreement is necessary to be pleaded — then, I say,

"First, that it is answered by an implied assent, as well as an express assent. I would put the case, suppose a lease for life should make a lease for years, reserving rent; and in debt for the rent the lessee should plead, that the plaintiff before the rent grew due surrendered to him in reversion, and he accepted it, and issue is upon the acceptance; and at the trial it is proved, that the plaintiff had executed a deed of surrender for the same to him in reversion in the absence; would not this turn the proof upon the plaintiff, that he no assent or dissent to this surrender? For surely his agreement is prima facie presumed, and then the rule is, *Semper praesumptio datur pro veritate*.

delivered as an escrow, and on condition that the same should not be delivered to the plaintiffs, but be utterly void and of no effect, unless certain creditors of the said R. B., and amongst others, certain persons carrying on trade under the firm of Cooper Brothers, being creditors of R. B., should sign the said indenture. It then averred, that this condition had not been complied with: *Et sic non est factum*. Issues having been taken thereon, it appeared at the trial, before *Abbott*, C. J., at the last sittings at Guildhall, on the examination of Edward Symes, the defendant's attorney, who was the subscribing witness to the deed, that at the meeting at which the deed was executed by the defendant, there was a conversation respecting the difficulty which might arise, in case all Bulpin's creditors did not execute the deed, when it was stated that the deed should be void, unless all the creditors executed it. At this conversation the plaintiffs were not present, and the defendant subsequently, but at the same interview, executed the deed in the ordinary way, and without saying anything at the time of the execution. The deed was delivered to Burnell, one of the creditors, who was to get it executed by the other parties. *Abbott*, C. J., at the trial, thought that the condition previously expressed, although not introduced into the act of delivery, was sufficient to make this a delivery of the deed, as an escrow; and as it appeared that the condition had not been complied with, he held that the plaintiffs were not entitled to recover, and directed a nonsuit.

Murrgat, on a former day, moved to set aside the nonsuit. This is a delivery by the defendant, as his deed, and not as an escrow. In Sheppard's Touchstone, p. 56, the delivery of a deed as an escrow is said to be "where one doth make and seal a deed, and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to the party." But he adds two cautions: "First, that the

"Again, I say it appears by the cases cited that it is not always pleaded, and when pleaded 't is upon a special reason, as I have shown before, *i. e.*, to conclude the party from disagreeing; and it would be very hard to prove in reason, that an agreement (admitting an express assent to be necessary) must be pleaded; for if it were a necessary circumstance to the conveyance, why then 't is implied in pleading *sursum reddidit:* for it cannot be a surrender without it.

"In pleading of a feoffment it is enough to say *feoffavit*, for that implies livery; for it cannot be a feoffment without it.

"Now why should not *sursum reddidit* imply all necessary requisites, as well as *feoffavit*? and therefore I do not see that any great argument can be drawn from the pleading. For,

"1. It is not always to be pleaded.

"2. It cannot be made out to be necessary so to plead it; for if assent be a necessary requisite, then 't is implied by saying *sursum reddidit*, as livery is in *feoffavit*, and then to add the words of express consent is as superfluous, as to show livery after saying *feoffavit*.

"And again, if it were always necessary, it is sufficiently answered by an assent intended in law; for presumptions of law stand as strong till the contrary appears, as an express declaration of the party."

See *accord.*, *Peavey* v. *Tilton*, 18 N. H. 151 (1846).

words used in the delivery be apt and proper; second, that it be delivered to a stranger, and one who is no party to it." Here neither of these requisites have been complied with; for the deed has been delivered without apt and proper words at the time of delivery, and the delivery was not to a stranger, but to a party to the deed. In Com. Dig., tit. Fait., A. 3, it is laid down, that if it be delivered, as his deed, to a stranger, to be delivered to the party on performance of a condition, it shall be his deed presently; and if the party obtains it, he may sue before the condition performed. That is, therefore, an express authority in point.

Cur. adv. vult.

Per Curiam. We are of opinion, in this case, that there must be no rule granted. The conversation which, according to the evidence of Symes, took place immediately previous to the execution of this deed, must be taken as part of the whole transaction; and if so, the subsequent delivery of the deed by the defendant was conditional, and not absolute on his part; and then the defendant will be entitled to our judgment. The passage cited from Comyns' Digest is not correct. The authority quoted for the law there laid down is *Digory and Roe's Case*, 1 Leon. 152, where it is undoubtedly so stated in the course of the argument by three judges, against the opinion of the fourth. But it does not appear in Leonard to have been finally decided: and upon looking to the report of the same case, in Moore, 300, it will be found, that, ultimately, the case was decided the other way. That case is, therefore, an authority against the present application.

Rule refused.

DOE d. GARNONS *v.* KNIGHT.

King's Bench. 1826.

[*Reported 5 B. & C.* 671.]

This was an ejectment brought to recover possession of certain messuages and lands in the County of Flint. The lessor of the plaintiff claimed the property as mortgagee under a deed purporting to be executed by W. Wynne, deceased. At the trial before *Garrow*, B., at the Summer Assizes for the County of Stafford, 1825, the principal question turned on the validity of that deed; and the following appeared to be the facts of the case: Wynne was an attorney residing at Mold in Flintshire, and had acted in that character for Garnons, the lessor of the plaintiff, who resided at a distance of about three miles from Mold. Wynne's sister and niece lived in a house adjoining to his own at Mold. On the 12th of April, 1820, about six o'clock in the evening, Wynne called at his sister's house, his niece then being the only person at home, and asked her to witness or sign some parchment. He produced the parchment, placed it on the table, signed his name, and then

said, "I deliver this as my act and deed," putting his finger at the same time on the seal; the niece signed her name, and he took it away with him. The deed remained on the table until he took it away. He did not mention to his niece the contents of the deed, or the name of Mr. Garnons. The niece had no authority from Mr. Garnons to receive anything for him. It was proved by Miss Elizabeth Wynne, the sister of Wynne, that in April, 1820 (but whether before or after the execution of the deed as above mentioned did not distinctly appear), he brought her a brown paper parcel, and said, "Here, Bess, keep this: it belongs to Mr. Garnons." Nothing further passed at this time; but a few days after he came again, and asked for the parcel, and she gave it to him: he returned it back to her again on the 14th, 15th, or 16th of April, saying, "Here, put this by." When she received it the second time, it was less in bulk than before. Wynne died in August, 1820. After his funeral, she delivered this parcel to one Barker in the same state in which she received it from her brother. Barker, who was an intimate friend of Wynne, stated, that the latter in July, 1814, sent for him, and told him that he had received upwards of £26,000 upon Mr. Garnons' account; and after taking credit for sums he had paid, and placed out for Mr. Garnons, he was still indebted to him in more than £13,000. He then asked the witness, if he, as his (Wynne's) friend, would see Mr. Garnons to explain the circumstances. The witness consented, and Wynne then made a statement of his property, by which it appeared that after payment of his debts, including the £13,000, he would have a surplus for himself and family of £8,000 at the least. He desired the witness to tell Garnons that, although he could not pay him at that time, he would *take care to make him perfectly secure* for all the moneys due from him. Upon this being communicated to Garnons he desired Barker to assure Wynne, that he would not then distress him, or expose his circumstances, but he expected that he would provide him securities for the money he, Wynne, owed him. This was communicated to Wynne, who expressed great gratitude to Garnons, and said he would take care to make him perfectly secure. After the funeral of Wynne, his will was produced, and with it was a paper in his own handwriting, containing a statement of his property, and a list of various debts secured by mortgage or bond, and among others, under the title "*mortgage*," there was stated to be a debt to Mr. Garnons for £10,000. Miss Wynne soon after delivered to the witness, Barker, a brown paper parcel sealed, but not directed. Upon this being opened, there was enclosed in it another white paper parcel, directed, in the handwriting of Wynne, "Richard Garnons, Esq." Within it was a mortgage deed (the same that was witnessed by Wynne's niece, as before stated), from Wynne to Garnons for £10,000. There was also within the white parcel, a paper folded in the form of a letter directed in the handwriting of Wynne to Mr. Garnons. That contained a statement of the account between Wynne and Garnons, and £10,000; part of the balance due

from Wynne to Garnons, was stated to be secured upon Wynne's property. The mortgage deed found in the parcel was then delivered to Garnons. It was a mortgage of all Wynne's real estates. It was contended on the part of the defendant that nothing passed by the deed, inasmuch as there had been no sufficient delivery of it to the mortgagee, or to any person on his behalf, to make it valid; and, secondly, because it was fraudulent and void against the creditors of the grantor under the Statute 13 Eliz. c. 5. The learned judge overruled the objections, and the defendant then proved that Mr. Wynne, in May, 1820, had delivered to him a bond and mortgage of his real estates, to secure money due from Wynne to him; and that by his will he devised all his estates to the defendant, Knight, in trust to sell and pay his debts. It was further proved, that about the 5th of April a skin of parchment with a £12 stamp was prepared by Wynne's order, and for a few days he remained in his private room, with the door shut. A clerk entered the room and found him writing upon a parchment: he afterwards locked the door. There was no draft of the mortgage in the office, and he never mentioned it. The whole of the deed was in Wynne's own handwriting. He had three clerks, and deeds were in the usual course of business executed in the office, and witnessed by himself and his clerks. The learned judge told the jury, that the first question for their consideration was, whether the mortgage to the lessor of the plaintiff was duly executed by Wynne the deceased; but that if they thought it was originally well executed, the question for their consideration would be, whether the delivery to Mrs. Elizabeth Wynne was a good delivery; and he told them he was of opinion, that if, after it was formally executed, Mr. Wynne had delivered it to a friend of Mr. Garnons, or to his banker for his use, such delivery would have been sufficient to vest in Mr. Garnons the interest intended to be conveyed to him under it; and the question for them to decide was, whether the delivery to Miss Wynne was, under all the circumstances of the case, a departing with the possession of the deed, and of the power and control over it, for the benefit of Mr. Garnons, and to be delivered to him either in Mr. Wynne's lifetime or after his death; or whether it was delivered to Miss Wynne merely for safe custody as the depository, and subject to his future control and disposition. If they were of opinion that it was delivered merely for the latter purpose, they should find for the defendant, otherwise for the plaintiff. A verdict having been found for the plaintiff, *Campbell* in last Michaelmas Term obtained a rule *nisi* for a new trial.

Taunton and *G. R. Cross*, at the sittings in banc after Hilary Term, showed cause.

Campbell and *Oldnall Russell*, contra.

Cur. adv. vult.

Bayley, J., now delivered the judgment of the court.

There were two points in this case. One, whether there was an effectual delivery of a mortgage deed, under which the lessor of the

plaintiff claimed, so as to make the mortgage operate. The other, whether such mortgage was or was not void against creditors or a subsequent mortgagee. Upon the first point the facts were shortly these. In July, 1814, Mr. Wynne, an attorney, who was seised in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (Wynne) had misapplied above £10,000 of his (Garnons') money. Garnons answered, he relied and expected that Wynne would provide him securities for his money; and Wynne said he would make him perfectly secure, and he should be no loser. On the 12th of April, 1820, Wynne went to his sister's, who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece, and used the words: "I deliver this as my act and deed." The niece, by his desire, attested the execution, and then Mr. Wynne took it away. The niece knew not what the deed was, nor was Mr. Garnons' name mentioned. In the same month of April he delivered a brown paper parcel to his sister, saying, "Here, Bess, keep this: it belongs to Mr. Garnons." He came for it again in a few days, and she gave it him; and he returned it on the 14th, 15th, or 16th of April, saying, "Here, put this by." It was then less in bulk than before, and contained the mortgage in question. Mr. Wynne died the 10th of August following, and after his death the parcel was opened, and the mortgage found. Mr. Garnons knew nothing of the mortgage until after it was so found. My Brother Garrow, who tried the cause, left two questions to the jury: one, whether the mortgage was duly executed; the other, whether the delivery to the sister was a good delivery; and he explained to them, that if the delivery was a departing with the possession, and of the power and control over the deed for the benefit of Mr. Garnons, in order that it might be delivered to him either in Mr. Wynne's lifetime, or after his death, the delivery would be good; but if it was delivered to the sister for safe custody only for Mr. Wynne, and to be subject to his future control and disposition, it was not a good delivery, and they ought to find for the defendant. The jury found for the plaintiff. Their opinion, therefore, was, that Mr. Wynne parted with the possession and all power and control over the deed, and that the sister held it for Mr. Garnons, free from the control and disposition of the brother. It was urged upon the argument, that there was no evidence to warrant this finding, and that the conclusion which the jury drew had no premises upon which it can be supported. Is this objection, however, valid? Why did Mr. Wynne part with the possession to his sister, except to put it out of his own control? Why did he say when he delivered the first parcel, "It belongs to Mr. Garnons," if he did not mean her to understand, that it was to be held for Mr. Garnons' use? And though the sister did return it to her brother when he asked for it, would she not have been justified had she refused? Might she not have said, "You told me it belonged to Mr. Garnons, and I will part with it to no one but with his concurrence." The find-

ing, therefore, of the jury, if this be a material point, appears to me well warranted by the evidence, and then there will be two questions upon the first point: one, whether when a deed is duly signed and sealed, and formally delivered with apt words of delivery, but is retained by the party executing it, that retention will obstruct the operation of the deed; the other, whether if delivery from such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the person who is to be benefited by it, until after the death of the party by whom it was executed. Upon the first question, whether a deed will operate as a deed though it is never parted with by the person who executed it, there are many authorities to show that it will. In *Barlow* v. *Heneage*, Prec. Cha. 211, George Heneage executed a deed purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, and gave bond to the same trustees conditioned to pay to them £1,000 at a certain day, in trust for his daughters; but he kept both deed and bond in his own power, and received the profits of the estate till he died; he noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly. It was urged, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only. Lord Keeper Wright said, *these were the father's deeds*, and he could not derogate from them; and the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only; but that decree was, that interest should be paid upon the bond from the time when the condition made the money payable. In *Clavering* v. *Clavering* (Prec. Cha. 235; 2 Vern. 473; 1 Bro. Parl. Cas. 122), Sir James Clavering settled an estate upon one son in 1684, and in 1690 made a settlement of the same estate upon another son: he never delivered out or published the settlement of 1684, but had it in his own power, and it was found after his death amongst his waste papers. See 2 Vern. 474, 475. A bill was filed under the settlement of 1690, for relief against the settlement of 1684; but Lord Keeper Wright held, the relief could not be granted, and observed, that though the settlement of 1684 was always in the custody or power of Sir James, that did not give him a power to resume the estate, and he dismissed the bill. In *Lady Hudson's Case*, cited by Lord Keeper Wright, a father, being displeased with his son, executed a deed giving his wife £100 per annum in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, cancelled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord Somers

dismissed the bill. In *Naldred* v. *Gilham*, 1 Pr. Wms. 577, Mrs. Naldred in 1707 executed a deed, by which she covenanted to stand seised to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement; a copy of this deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish this copy, and to have the second settlement delivered up; and Sir Joseph Jekyl determined, with great clearness, for the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. It is true, Lord Chancellor Parker reversed this decree; but it was not on the ground that the deed was not well executed, or that it was not binding because Mrs. Naldred had kept it in her possession, but because it was plain that she intended to keep *the estate* in her own power; that she designed that there should have been *a power of revocation in the settlement;* that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon, by the deed's being made an *absolute* conveyance, which was unreasonable, when it ought to have had a power of revocation, and because the plaintiff, if he had any title, had a title *at law*, and had, therefore, no business in a court of equity. Lord Parker's decision, therefore, is consistent with the position that a deed, *in general*, may be valid, though it remains under the control of the party who executes it, not at variance with it; and so it is clearly considered in *Boughton* v. *Boughton*, 1 Atkyns, 625. In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. Lord Hardwicke considered it as valid, and acted upon it; and he distinguished it from *Naldred* v. *Gilham*, which he said was not applicable to every case, but depended upon particular circumstances; and he described Lord Macclesfield as having stated, as the ground of his decree, that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking (or rather of reserving a power to revoke). Upon these authorities, it seems to me, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on *Doe* v. *Roberts*, 2 Barn. & A. 367, because there the brother who executed the deed, though he retained the title deeds, parted with the deed which he executed.

But if this point were doubtful, can there be any question but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept

what is for his benefit (11 East, 623, *per* Lord Ellenborough); and there is the strongest ground here for presuming Mr. Garnons' assent, because of his declaration that he relied and expected Mr. Wynne would provide him security for his money, and Wynne had given an answer importing that he would. Sheppard, who is particularly strict in requiring that the deed should pass from the possession of the grantor (and more strict than the cases I have stated imply to be necessary), lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger *for his use and on his behalf* (Shep. 57). And 2 Roll. Abr. (K.) 24, pl. 7; *Taw* v. *Bury*, Dyer, 167 b; 1 Anders. 4; and *Alford* v. *Lea*, 2 Leon. 111; Cro. Eliz. 54; and 3 Co. 27, are clear authorities, that, on a delivery to a stranger for the use and on the behalf of the grantee, the deed will operate *instanter*, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this: "If a man make an obligation to L., and deliver it to B., if L. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant (3 H. 6, 27)." The point is put *arguendo* by Paston, Serjt., in 3 H. 6, who adds, "for a servant may do what is for his master's advantage, what is to his disadvantage not." In *Taw* v. *Bury* an executor sued upon a bond: the defendant pleaded, that he caused the bond to be written and sealed, and delivered it to Calmady to deliver to the testator as defendant's deed; that Calmady offered to deliver it to testator as defendant's deed, and the testator refused to accept it as such; wherefore Calmady left it with testator as a schedule, and not as defendant's deed, and so *non est factum*. On demurrer on this and another ground, Sir Henry Brown and Dyer, Justices, held that, first by the delivery of it to Calmady, without speaking of it as the defendant's deed, the deed was good, and was in law the deed of defendant before any delivery over to the testator, and then testator's refusal could not undo it as defendant's deed from the beginning, and they gave judgment for the plaintiff, very much against the opinion of the Chief Justice, Sir Anthony Brown; but others of the King's Bench, says Dyer, agreed to that judgment. It was afterwards reversed, however, for a discontinuance in the pleadings. Sir A. Brown's doubt might possibly be grounded on this, that the delivery to Calmady was conditional, if the testator would accept it; and if so, it would not invalidate the position, which alone is material here, that an unconditional delivery to a stranger for the benefit of the grantee will inure immediately to the benefit of the grantee, and will make the deed a perfect deed, without any concurrence by the grantee. And this is further proved by *Alford* v. *Lea*, 2 Leon. 110; Cro. Eliz. 54. That was debt upon an arbitration bond: the award directed, that before the feast of Saint Peter both parties should release to each other all actions. Defendant executed a release on the eve of the feast, and delivered it to Prin to the use of the plaintiff, but the plaintiff did not

know of it until after the feast, and then he disagreed to it, and whether this was a performance of the condition was the question. It was urged that it was not, for the release took no effect till agreement of the releasee. It was answered, it was immediately a release, and defendant could not plead *non est factum*, or countermand it, and plaintiff might agree to it when he pleased. And it was adjudged to be a good performance of the condition, no place being appointed for delivering it, and the defendant might not be able to find the plaintiff, and they relied on *Tate's Case*. This, therefore, was a confirmation, at a distance of twenty eight years, of *Tate* v. *Berg*; and at a still later period (33 Eliz.), it was again confirmed in the great case of *Butler* v. *Baker*, 3 Co. 26 b. Lord Coke explains this point very satisfactorily. "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently. But if C. offer it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force (but, perhaps, in such case, A. in an action brought on this obligation cannot plead *non est factum*, because it was once his deed); and therewith agrees Hil. 1 Eliz., *Tate's Case*, s. p. Bro. Ab. Donee, pl. 29; 8 Vin. 188. The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested, and such disagreement need not be in a court of record. Note, reader, by this resolution you will not be led into error by certain opinions delivered by the way and without premeditation, in 7 Ed. 4, 7, &c., and other books *obiter*." Upon these authorities we are of opinion that the delivery of this deed by Wynne, and putting it into the possession of his sister, made it a good and valid deed at least from the time it was put into the sister's possession.

The remaining question then is this, whether this deed is void as against creditors under the 13 Eliz. *c.* 5, or as against defendant as a purchaser under 27 Eliz. *c.* 4? As to creditors, there was no proof of outstanding debts at the time of the trial, nor any proof of there being any creditor except the defendant, and he may be considered in the double character of creditor and purchaser. The facts in evidence as to him are merely these: that in May or June, 1820, Mr. Wynne delivered to his son a bond and mortgage for defendant and title deeds, and the mortgage and title deeds related to the same premises as Mr. Garnons' mortgage. What was the nature of the defendant's debt did not appear, or what was the consideration for the bond and mortgage. Whether any money was advanced when such bond and mortgage was given, or whether it was for a pre-existing debt, whether it was obtained by pressure from the defendant, or given voluntarily and of his own motion by Mr. Wynne, and whether the defendant knew of it or not, are points upon which there was no proof, and under these circumstances we cannot say the defendant made out a case to entitle him to treat Mr. Garnons' deed as void under either of the Statutes of Elizabeth.

should he be able hereafter to show that his mortgage is entitled to a preference, the present verdict will be no bar to his claim. For these reasons we are of opinion that the rule for a new trial must be discharged.

Rule discharged.[1]

EXTON *v.* SCOTT.

CHANCERY. 1833.

[*Reported* 6 *Sim.* 31.]

L. HAMPSON, a banker and solicitor, was, under his marriage settlement, dated in 1786, tenant for life of certain estates in Bedfordshire, with remainder to his daughters in fee; and the trustees of the settlement were empowered, with the consent of the tenant for life, to sell the estates and lay out the purchase money in the purchase of other estates to be settled to the same uses; and, in the mean time, the purchase-money was to be invested in Government or real securities. In 1809, 1810, and 1812, Edward Hampson, the brother of L. Hampson, and the surviving trustee of the settlement, at the request of L. Hampson, sold certain parts of the settled estates, and the purchase-moneys

[1] See *Xenos* v. *Wickham*, 13 C. B. N. S. 381; 14 C. B. N. S. 435; L. R. 2 H. L. 296.

"Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

"I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: 'I deliver this as my deed;' but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's Case*, 3 Co. Rep. 26, it is said: 'If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force.' I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case* by saying that C. must not be a servant of A., though, of course, that is very material in determining the question whether it was 'delivered to C. to B.'s use,' which I consider it to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B.' — *Per* BLACKBURN, J., L. R. 2 H. L. 312 (1867).

were paid into L. Hampson's bank, to an account intituled, "Messrs. L. & E. Hampson, Trust Money." The moneys so paid in, were afterwards invested in the purchase of Navy five per cents. in the name of L. Hampson alone, and, between January and August in 1812, he sold out part of the stock, and in December, 1814, he sold out the remainder, amounting to £5,000.

In July, 1811, and December, 1812, L. Hampson's two daughters married, and Sir John Filmer and Richard Gilpin were the trustees of their settlements.

By an indenture, dated the 18th of December, 1812, and expressed to be made between L. Hampson of the one part, and Sir John Filmer and Richard Gilpin (who were described as trustees named in the settlements made previous to and upon the marriages of the two daughters of L. Hampson, by Frances, his late wife, deceased) of the other part: after reciting that the sum of £5,000, the net money arising from the sale of the part of the settled estates in the County of Bedford comprised in the settlement made upon the marriage of L. Hampson with Frances, his late wife, was paid to and received by Hampson, and was then in his hands, as he thereby admitted and acknowledged, and that Hampson, previous to the marriages of his daughters, *undertook and agreed to execute a mortgage, to Filmer and Gilpin, of the messuages, lands, and hereditaments thereinafter mentioned and described, for securing the payment to them of the said sum of* £5,000 upon the trusts and for the purposes of the settlements made previous to the marriages of his said daughters: it was witnessed that, in consideration of the premises, and for better securing the repayment of the £5,000 to Filmer and Gilpin upon the trusts and for the purposes aforesaid, Hampson demised to them, all his messuages, lands, hereditaments, and real estates whatsoever, situate in the parishes of Luton and Caddington, in the County of Bedford, then in the possession or occupation of him and his tenants, for the term of 500 years, subject to redemption on payment by Hampson, to Filmer and Gilpin, of the sum of £5,000, with lawful interest for the same *from thenceforth*, upon the trusts and for the purposes aforesaid; and Hampson covenanted with Filmer and Gilpin, to pay to them the £5,000 and interest accordingly: and, by a bond of even date, he became bound to them in £10,000, conditioned for payment of the £5,000 with lawful interest, on the 18th of July then next.

In March, 1824, Hampson died insolvent and intestate; and a suit was shortly afterwards instituted, by two of his creditors on behalf of themselves and his other creditors, to have his estate applied in payment of his debts. The usual decree having been made, Sir John Filmer and Richard Gilpin, claimed, before the Master, to be paid the £5,000 secured by the bond and mortgage, as a debt due from the testator at his decease.

Sir J. Filmer made an affidavit in support of the claim, stating that Hampson was, at his death, indebted to him and Gilpin in £5,000,

being the net money arising from the sale of part of the estates comprised in Hampson's marriage settlement, which was paid to and received by him: in consideration whereof he agreed to execute the bond and mortgage, for securing the repayment thereof to Filmer and Gilpin as trustees of the settlements made on the marriages of his daughters, upon whom the estates would have descended if they had not been sold, and that he executed the bond and mortgage in pursuance of that agreement; and that the £5,000, with interest *from Hampson's death*, remained due from his estate.

It appeared, by the evidence in opposition to the claim, that the bond and mortgage were privately prepared by Hampson himself, and were in his own handwriting: that they were executed by him in his private office, and when no one was present except himself and the clerk who attested his execution; that, a few days after his death, they were found in an iron chest, in his bed-room, containing the title-deeds relating to the mortgaged premises and other estates, which were tied up in bundles separate from the bond and mortgage-deed; and that, before Hampson's death, the existence of those instruments was not known to the persons to whom they were executed, or to any of the persons interested under the same; and one of the witnesses, who had been a partner with Hampson in his banking business, deposed that, on the 18th of December, 1812, Hampson was indebted to certain persons in sums amounting to £3,600, which still remained unpaid, and that, on the same day, Hampson, as the witness *believed*, was insolvent.

The Master having reported that the bond and mortgage were, in his opinion, void against Hampson's creditors, Filmer and Gilpin excepted to the report.

Sir E. Sugden and *Mr. Thompson*, in support of the exceptions.

Mr. Knight and *Mr. Turner*, for the plaintiffs, in support of the report.

Mr. Rolfe and *Mr. Barber* appeared for Hampson's personal representatives.

The Vice-Chancellor [Sir Lancelot Shadwell]. I take it to be proved that the mortgage-deed was sealed and delivered by Mr. Hampson; and, therefore, it is good, unless it is shown either that there was fraud connected with the execution of it, or that it was intended to be delivered as an escrow: but, in the latter case, there must be circumstances to show that the deed was intended to take effect conditionally, and not absolutely.

Upon the development of all the circumstances of the transaction, there is no circumstance with respect to which this deed can be considered to have been delivered as an escrow: there is no evidence to show that it was not intended to operate, immediately, as a security for the £5,000 which Hampson had received. The law then is, *prima facie*, in favor of the exceptants.

With respect to the recital that Hampson had agreed to execute the mortgage, that recital is a mere matter of course: and, as he had

received the £5,000, that circumstance would justify the security; and, consequently, that mere recital, though it was not founded in fact, would not invalidate the deed.

It appears, from the Master's report made in pursuance of the decree on the hearing of the cause, that I am not at liberty to infer that Hampson was in a state of insolvency at the time when he executed the security; for it appears that he was then indebted to the amount of £3,000 or £4,000 only. There being then nothing to show either inability to grant the security, or fraud, here, I have the fact that the deed was sealed and delivered; and then I have the authority of the law for saying that the mere retainer of the deed will not affect its validity.

Exception allowed.

WILLIAM GUDGEN *v.* JAMES BESSET.

Queen's Bench. 1856.

[*Reported* 6 *E. & B.* 986.]

Action for use and occupation. Plea: Never indebted. Issue thereon.

On the trial, before *Wightman*, J., at the London Sittings after Trinity Term, 1856, it appeared that the plaintiff was entitled for a term of years to the possession of the premises, and that in 1854 he had agreed with one Patullo to let the premises to him for a term of forty years, Patullo paying £100 for the fixtures and good-will. Patullo was not prepared to pay the whole sum; he paid down £50; and it was arranged that till he paid the balance he should occupy the premises as tenant from year to year, at the rent and on the terms in the intended lease; and accordingly he entered and occupied. Subsequently, in September, 1855, Patullo became bankrupt; the defendant, Besset, was appointed his assignee. The plaintiff's case was, that Besset had elected to take the premises as assignee of Patullo's interest; and he sued for three quarters rent accruing after such alleged election. The defendant's case was that he never had so elected, and that all the acts relied upon as evidence of such an election were merely preliminary experiments as to the value of the premises, to enable him to decide how he would elect; but upon this, which was the substantial controversy, the evidence was entirely in favor of the plaintiff. In the course of the cause, however, the plaintiff, who was a witness on his own behalf, unexpectedly produced from his pocket a parchment, which purported to be a lease from him to Patullo, signed, sealed, and delivered by the plaintiff. His statement as to this was, that, when the agreement to let Patullo into possession was come to, the lease had been drawn up, and that it was signed, sealed, and delivered, but that he was to keep it till the balance of the £100 was paid. No third person was present; and the plaintiff, who seemed to be under the

impression that the absence of an attesting witness rendered a deed inoperative, stated that he delivered the deed, but that it was not attested. The objection was taken that, Patullo having an interest under a lease under seal, no action against his assignee for use and occupation would lie, the remedy being in covenant.

The learned judge directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiff, if the court should be of opinion that the evidence would warrant the jury in finding such a verdict.

Mellor, in this term, obtained a rule *nisi* accordingly.

Petersdorff now showed cause.

Mellor and *Beasley*, in support of the rule.

Lord CAMPBELL, C. J. *Bowker* v. *Burdekin*, 11 M. & W. 128, 147, removes a doubt on which we should otherwise have taken time to consider. I think that, looking at all the facts here, it must have been the intention of both parties that the instrument should not operate as a lease till the money was paid, and that neither party intended that the interest in the term should vest till then. The formality of delivering the instrument to a third person as an escrow was not essential when it was intended to operate as such. Therefore Patullo himself could never have been sued in covenant on that deed; he was only tenant from year to year, under the terms on which if the deed had operated he would have been tenant for years. Then there is ample evidence that the defendant took Patullo's interest whatever it was; and, as Patullo himself might have been sued in use and occupation, the technical objection, which at one time seemed most formidable, is obviated.

COLERIDGE, J. I agree. If Patullo was not in as lessee under the demise by deed, this action may be maintained against the defendant as his assignee. Now Patullo was, it appears, admitted to hold the premises as tenant from year to year, on the terms contained in the deed; but he never was in under the deed so as to be liable to be sued on the covenants in it. The detention of the parchment by the plaintiff in itself is a fact very significant of what their intention was; but, when that is coupled with the express agreement that Patullo should not be tenant for the term of years till he paid the money, it is clear what was meant.

WIGHTMAN, J. The evidence was that the defendant took possession of these premises as assignee of the bankrupt Patullo; and there was ample evidence to warrant the conclusion that he elected to take the interest of Patullo in the tenancy. The difficulty was that there was what was, in form at least, a deed under the plaintiff's seal, demising the premises to Patullo for a term of years; and, if Patullo held under a demise by deed, the action ought to have been in covenant. Then the question comes to be whether the evidence was such as would justify a jury in inferring that Patullo did not hold under the deed. Now the evidence is that the deed was executed in due form; and therefore the question is whether the jury would be warranted in inferring that at the time of the execution it was intended by both parties that it should

not pass any present interest: for if it passed any *interesse termini* the entry by Patullo would preclude all objections to an action in covenant. But there was evidence enough that, by the understanding of both parties at the time, the execution was not to take effect till the remainder of the £100 had been paid, and that the instrument was left in the custody of the plaintiff, not merely as detaining the parchment, but as evidencing the intention of the parties that the term was not to begin till that payment was made. There were circumstances showing that such was the intention: and the passage cited from the judgment of Parke, B., in *Booker* v. *Burdekin*, 11 M. & W. 147, shows that the question is, not what the words were, but what was the intention at the time.

ERLE, J. I also think that the action lies. The defendant is in the position of Patullo, whose interest has vested in him. Could use and occupation have been maintained against Patullo? There was an agreement that he should have a lease by deed for forty years, provided he paid down £100; and, he having only paid £50, he was let into possession as tenant from year to year, on the terms of the lease, till he should pay the residue and entitle himself to the term. Then, says the defendant, that is all true, but a deed was engrossed on parchment and sealed, the plaintiff signed it, and used the words, "I deliver this as my act and deed." Now I am of opinion that, if it was at the time agreed between the parties that, though these words were used, the deed should not operate, it would not operate. There was evidence here, from which I draw the conclusion that it was not intended to operate; and therefore I conclude that the deed was never so delivered as to operate, and therefore that use and occupation well lies.

LORD CAMPBELL, C. J. I wish to say, in case I have not expressed it before, that I should attach no weight whatever to what the grantor might think or intend when he delivered the instrument, unless I thought that it was intended and agreed by both parties that the delivery should operate only as the delivery of an escrow.

Rule absolute.[1]

[1] "This deed, as I have stated, undoubtedly was not to be considered as complete until the sums were introduced. But it has been said, if it was delivered to the party it could not be delivered as an escrow, unless so delivered, in terms. Perhaps, technically speaking, this is so; because a deed delivered to a party is not an escrow: a deed delivered to a stranger is an escrow till something is done: but though it is delivered to a party, there are cases, and in the same page, to which my learned brother referred, to show that it is not a perfect and complete deed; Com. Dig. tit. *Fait* (A 3): 'So if it be once delivered as his deed, it is sufficient, though he afterwards explained his intent otherwise, as if an obligation be made to A. and delivered to A. himself as an escrow, to be his deed on the performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant.' The authorities referred to in the text, in support of this position, are at least conflicting; but in the next division (A 4) it appears that this position about delivery as an escrow is merely a technical subtlety; for the learned writer says, 'If it be delivered to the party as an escrow, to be his deed on the performance of a condition, it is not his deed if the condition is performed, though the party happens to have it before the condition is

WATKINS v. NASH.

CHANCERY. 1875.

[*Reported L. R.* 20 *Eq.* 262.]

THIS was a foreclosure suit. According to the judgment of the Vice-Chancellor, the evidence in the case, which was somewhat conflicting, resulted in establishing the following facts: —

The plaintiffs, Benjamin Watkins and William Hutcheson Collins, were the trustees of the settlement executed on the marriage of Mr. John Henry Skyrme, a solicitor, practising at Ross, in the County of Hereford, under which instrument the wife took the first life interest in the settled property.

By an indenture, dated the 29th of November, 1866, the defendant, Francis Nash, conveyed to the plaintiffs, their heirs and assigns, certain freehold hereditaments in the Forest of Dean, by way of mortgage, for securing the repayment of a sum of £2,000, part of their trust fund, which the plaintiffs then advanced to Nash.

In the year 1869, Skyrme, who was Nash's solicitor, informed the plaintiffs that Nash was desirous of paying off the mortgage debt, and of taking a reconveyance to himself, and a reconveyance was accordingly prepared, and was engrossed on the indenture of mortgage.

Collins, who was a solicitor, resided at Ross, and Watkins, who was a farmer, resided nine miles from Ross, and only attended that town for business purposes.

On the 23d of December, 1869, Skyrme, in company with Watkins, called upon Collins at his office in Ross, and at Skyrme's request, and upon his representation that it would facilitate the speedy completion of the matter, Watkins then and there executed the reconveyance as an escrow conditional on the payment of the mortgage debt, and left it with Collins.

Nothing further was done in the matter until the 18th of April, 1872,

---

part sealed." This he lays down on his own authority, without referring to any case; and I am surprised in saying we cannot have a better authority than that learned writer.

"Let us see how that doctrine applies to the present case. The parties meet; something is to be done before a complete deed can be made; the sums are to be ascertained which the different creditors are to be paid. That cannot be ascertained that day, it is ascertained at a subsequent day, and they are written in. Take it, if you please, that this is a delivery of the deed as a deed, is it not a delivery of the deed, in the language of Lord Coke, upon condition; that is, upon condition that something is to be done, which at that time was not done? That something is afterwards done; then, and not till then, it becomes a perfect deed. It seems to me, therefore, without touching any of the cases that have been decided on the operation of deeds, we may say that this deed was not a complete deed, executed so as to have effect in the hands of the parties until those sums were written in." — Per Erle, C. J., in *Hudson* v. *Revett*, 5 Bing. 368, 388 (1829).

when Skyrme, in company with Watkins, called on Collins, and told him that Nash, the mortgagor, was about to sell the mortgaged property, and intended to pay off the mortgage debt in the then following week, and Skyrme then requested Collins to execute the reconveyance so as to enable him (Skyrme) to take it to London to be stamped, and by making an affidavit that the matter had until then been unsettled to save the penalty payable on the non-stamping of the instrument. Collins upon this request executed the reconveyance and handed it to Skyrme, taking from him an undertaking in writing to return it in two days, which undertaking contained a statement to the effect that the deed had been executed as an escrow, and upon the faith of an undertaking that the business should be forthwith settled.

The reconveyance was returned by Skyrme to the plaintiffs a few days afterwards; the mortgage debt was, however, never paid to the plaintiffs. On the 27th of April, 1873, Skyrme died, and on the 3rd of June, 1873, the plaintiffs gave Nash notice to pay off the mortgage debt and interest. It was then discovered that Skyrme had fraudulently appropriated the money raised by Nash to pay off the mortgage debt, leaving Nash under the impression that it had been paid off, and the property reconveyed in December, 1869; and although no interest had been claimed by the plaintiffs between December, 1869, and June, 1873, this was accounted for by the fact that Skyrme had continued up to the time of his death to be the solicitor of Nash, the mortgagor; and by the fact that, being the husband of the person entitled to the first life interest, Skyrme had always been permitted by the plaintiffs, the mortgagees, to receive the interest from Nash on behalf of his wife. The written undertaking given by Skyrme to the plaintiffs upon the execution of the deed by Collins had been given up to Skyrme when he returned the reconveyance, and was not forthcoming.

The only question in the suit calling for a report was, whether, under the circumstances, the reconveyance was an escrow or not.

Mr. W. Pearson, Q. C., and *Mr. A. Thomson*, for the plaintiffs.

Mr. Dickinson, Q. C., and *Mr. Cozens-Hardy* (*Mr. J. O. Griffits* with them), for Mr. Nash, the mortgagor.

Mr. Colt, *Mr. W. L. Selfe*, *Mr. Morgan*, Q. C., and *Mr. Cookson*, for subsequent encumbrancers.

Sir Charles Hall, V. C. It appears to me to be established by the evidence that the deed of reconveyance was executed by Watkins on the 23d of December, 1869, and that the execution of the deed on that day was intended to be an execution of an incomplete character: that is, that the parties did not mean the deed so executed to be clearly and for all purposes operative as an effectual conveyance as from that time, without more, of the legal estate in the undivided moiety which alone could pass by the execution of Watkins. The execution was, I think, intended to be only operative on certain conditions. I think it is also established by the evidence, as well written as oral, that the reconveyance was not executed by Collins until the 18th of April, 1872.

That being so, the matter is in this position: The plaintiffs had a complete legal mortgage of the property in question made to them on the 29th of December, 1866, and so matters remained until the deed was executed by Watkins on the 23d of December, 1869. Now, as to this execution operating effectually or not at law, there can be no doubt that it was intended to be what is called an escrow. But it is said that the deed thus executed could not be an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books, — Sheppard's Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A. B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument. As regards the instrument in question, it might very well, under the circumstances, be meant and taken to be a delivery by Watkins to Collins, to be held by him for the purpose of being delivered over to the grantee when the transaction was complete. I see no difficulty whatever in that view being adopted.

Then, as regards the subsequent delivery, when the deed was executed on the 18th of April, 1872, by Collins, I see no difficulty, if necessary, in holding that, if that were a delivery to Skyrme himself, it was a delivery to him as an agent for all parties for the purpose of that delivery. And in holding that there may be delivery to a third party for the benefit of all parties, I am confirmed by the authority of *Millership* v. *Brookes*, 5 H. & N. 797.

The circumstances of that case are not exactly the same as those in the present, and perhaps the person to whom the instrument was delivered there was really a third person and a stranger; but I consider the principle upon which that case proceeded was this: that the delivery was not to the grantee, or the person who was to have the benefit of the deed, but was to some one as the person who was to hold or to be considered as holding the deed in an incomplete state for the benefit of all parties. Therefore, if it be true, as it appears from Mr. Collins' cross-examination, that the delivery was to Skyrme, I should not feel that to be insuperable evidence against the memorandum, which was undoubtedly signed at the time, to the effect that the deed was to be an escrow, and was not intended to be delivered to the grantee. But I might go further, and say, if it were necessary to determine the question, that the document might be an escrow, even though there was no par-

ticular person selected who under the circumstances could be considered as being the person into whose hands it was delivered, it being clear that there was no delivery at all to the grantee; that the delivery was not intended to be a delivery to the grantee at all, and that it was intended to be an instrument incomplete as a transfer of the legal estate until the conditions prescribed had been performed.

That being so, it follows that, in my judgment, the plaintiffs retain and have the legal estate in the property, unaffected by anything which has taken place.

[His Honor then considered the other points in the case, and made the usual foreclosure decree, determining the priorities of the various encumbrancers.][1]

WHEELWRIGHT *v.* WHEELWRIGHT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1807.

[*Reported* 2 *Mass.* 447.]

THE petitioners set forth that Joseph [Wheelwright] is seised in fee simple of four undivided ninth parts, and the other petitioners of two undivided ninth parts, of thirty-one acres of salt-marsh lying in Wells, in common with the said Aaron Wheelwright, and they pray that their respective parts may be set off to them in severalty.

The respondent pleads in bar that Samuel Wheelwright, grandfather of the respondent, on the 30th day of January, A. D. 1700, being seised in fee of the premises, made his last will in writing, which was afterwards duly proved, and by which he devised the premises to his son, Joseph Wheelwright, father of the respondent, in fee tail general, who entered and was seised, and from whom the premises descended to the respondent, as eldest son and heir in tail to his father, — and traverses the seisin in common with the petitioners, which they, in their replication, affirm, and tender an issue to the country, which is joined by the respondent.

Upon trial of this issue before *Thatcher*, J., October Term, A. D. 1805, the respondent produced the last will of Samuel Wheelwright, by which it was admitted, for this trial, that the premises were devised in tail to Joseph, son of the testator, and father of the respondent, and also of Joseph W., one of the petitioners, and of the husband of Mary W., another of the petitioners, and grandfather of the remaining petitioners. It was also admitted that the respondent was the heir male of Joseph, his father.

The petitioners produced, in support of their claim, two deeds of the said Joseph, bearing date May 4, 1795, one whereof purported to be a conveyance of four ninth parts to the petitioner Joseph, and the other

[1] See *C. W. & Z. R. R. Co.* v. *Hoff*, 13 Ohio St. 235 (1862).

a conveyance of two ninth parts to the remaining petitioners; and they read on those deeds to show that they were respectively seised, in fee simple, of the several shares so conveyed. Upon producing these deeds by the petitioners, the respondent called for the evidence of their execution before they should be read. Nathaniel Wells, Esq., was produced as a witness, who testified that, in the year 1795, the petitioner Joseph requested him, by direction from his father, as he said, to write those two deeds. Having written them, on the 4th of May, 1795, the father called upon him, and signed and sealed the two deeds in presence of the witness and his brother, since deceased, and delivered them for the use of the grantees, and that he and his brother subscribed their names as witnesses. That it was the intent of the parties that the grantor should have the use of the premises during his life; and as some of the grantees were minors, and could not secure the use to him, that the deeds were delivered as *escrows*, as he expressed it, to be delivered by him to the grantees upon the death of the grantor, which the witness has accordingly done. That the witness understood from the grantor that his intent, in executing the deeds, was to prevent the entail from depriving the grantees of the land conveyed.

The counsel for the respondent objected to the reading of the deeds to the jury upon this evidence, upon the ground that there was no proof that the same, or either of them, was duly executed and delivered by the grantor in his lifetime to either of the grantees, or to any person authorized by them, or either of them, to receive the same; and that if they had been duly executed and delivered, they were not made *bona fide*, but merely and for the express purpose of destroying the entail of said lands.

The judge overruled the objection, permitted the deeds to go in evidence, and directed the jury that they were sufficient and legal evidence to maintain the issue on the part of the petitioners. After a verdict for the petitioners, the respondent's counsel filed exceptions to the above opinion and direction of the judge, which were allowed and signed pursuant to the Statute, and at the last July Term of the court, the question of the validity of those exceptions came on to be argued.

Mellen, in support of the exceptions.

Wallingford, on the other side.

The Solicitor-General, *Davis*, in reply.

The cause was continued for advisement, and at this term the opinion of the court was delivered by

Parsons, C. J. (who stated the history of the cause, and proceeded). The right which the father of the respondent had to convey any of the lands he held in tail must be derived from the Statute of March 8, 1792. By that Statute it is made lawful for any person of full age, seised in fee tail of any lands, by deed duly executed before two subscribing witnesses, acknowledged before the Supreme Judicial Court, Court of Common Pleas, or a justice of the peace, and registered in the records

of the county where the lands are, for a good or valuable consideration, *bona fide* to convey such lands, or any part thereof, in fee simple, to any person capable of taking and holding such estate; and such deed, so made, executed, acknowledged, and registered, shall bar all estates tail in such lands, and all remainders and reversions expectant thereon.

From inspecting the deeds produced in evidence in this cause, it appears that two subscribing witnesses, to whose credibility no objection is made, have certified that they were signed, sealed, and delivered, in their presence. And it further appears that the grantor, on the same day, acknowledged that each instrument was his deed before a justice of the peace.

One objection made by the respondent is, that, admitting the deeds to have been executed in the form and manner required by the Statute in this case, yet these conveyances are not *bona fide*, being made, not for a valuable consideration, but for the purpose of depriving the heir in tail of his inheritance. The deeds purport to be for a valuable consideration in money, and for love and affection to his issue, which is a *good* consideration. The Statute also provides that the conveyance may be on *good* consideration. It is therefore very clear that the Statute intended that the tenant in tail might bar the heir in tail, by deed conveying the land to his relatives, executed for a good although not a valuable consideration. This he might do by a common recovery; and this method by deed is substituted by the Statute in the place of that common assurance, the effect of which is founded on legal fictions. And it is certain that justice, or parental affection, will often induce parents who hold their lands in tail to make provision for the younger branches of their family out of the entail. As the Statute has made the estate tail assets for the payment of the debts of the tenant, before and after his decease, a *bona fide* conveyance was required by the Statute, to prevent alienations to defraud creditors, and not to protect the heir in tail. This objection cannot prevail.

The other objection is that, by the Statute, the conveyance should be completed, and the estate pass, in the lifetime of the tenant in tail, and that the deed should be sealed, delivered, and acknowledged, by him as his deed; that, in the case at bar, the deeds were delivered by the grantor to Judge Wells, not as his deeds, but as his writings or *escrows*, to be delivered as his deeds by the judge to the grantees on his, the grantor's, death; that they could have no effect until delivered by the judge accordingly; and, as the grantor was dead before the second delivery, they were never his deeds, but are void.

This objection seemed to deserve much consideration. The Statute certainly intended that the conveyance of the estate tail should be executed in the lifetime of the tenant; and therefore, if there be no acknowledgment of the deed by him, the defect cannot be supplied by the testimony of the subscribing witnesses after his death, as it may be in conveyances of estates not entailed. The reason is, as common

recoveries must be suffered in the lifetime of the tenant in tail, and at a court holden at stated times, and the heir in tail has a chance that the tenant may, after the commencement of the suit, die before the term, so it was intended to leave him the chance of the tenant's dying before acknowledgment, which, as the Statute was first drawn, could be made only in some court of record; although, as it was amended, it may now be made before a justice of the peace. There is therefore some chance saved to him, but of much less consequence than it was before the bill was amended.

The law, so far as it relates to the nature of this objection, is very well settled. If a grantor deliver any writing *as his deed* to a third person, to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of *non est factum*, whether generally or specially pleaded. This appears from Perk. 143, 144, and from the case of *Bushell* v. *Pasmore*, 6 Mod. 217, 218. But if the grantor make a writing, and seal it, and deliver it to a third person, as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his, the grantor's deed, — and it be delivered to the grantee accordingly, — it is not the grantor's deed until the second delivery; and if the grantee obtain the possession of it before the event happen, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. This appears from Perk. 142, 137, 138.

It is generally true that a deed delivered as an escrow, to be delivered over as the deed of the party making it, on a future event, takes its effect from the second delivery, and shall be considered as the deed of the party from that time. Perk. 143, 144; 3 Co. 35 b, 36 a.

Whether the deeds in this case were delivered to Judge Wells as writings to be delivered over as the grantor's deeds on his death, or whether they were delivered as the deeds of the grantor to Judge Wells, in trust for the grantees, to be delivered to them on the grantor's death, is a question of fact, to be determined by the evidence. This evidence results from the testimony of Judge Wells, and from the inspection of the deeds. The deeds appear to have been signed, sealed, and *delivered*, in the presence of two subscribing witnesses, and to have been acknowledged as the deeds of the grantor before a justice of the peace. The witness swears that the grantor did then sign, seal, and deliver, them for the use of the grantees. Thus far there can be no doubt. But the witness further testifies that, because the grantor was to have the use of the premises during his life, and some of the grantees being minors, the deeds were delivered to him as escrows, to be delivered to the grantees upon the grantor's death. What the witness understood by escrow is not explained. He might consider them as escrows, because he was to have the custody of them until the grantor's death. To aid his memory, he therefore refers us

to the memorandum he made, at the time, upon the wrapper of the deeds. In that memorandum they are called the two deeds of the grantor, naming him, to the grantees, naming them, to be kept until the death of the grantor, and then to be delivered to the grantees. Here they are not called the writings, or escrows, but the deeds, of the grantor. The weight of the evidence is certainly very great, if not conclusive, in favor of the deeds having been delivered by the grantor, as his deeds, and deposited with Judge Wells, in trust for the grantees. Upon this ground the deeds were very properly admitted as evidence, and the direction of the judge was correct.

But if the deeds are to be considered as delivered to Judge Wells, not as the deeds, but as the writings, of the grantor, we must not thence conclude that they are void. Although generally an escrow takes its effect from the second delivery, yet there are excepted cases, in which it takes its effect, and is considered the deed of the maker, from the first delivery. The exception is founded on necessity, *ut res valeat*. Thus Perk. 139, 140. If a *feme sole* seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise, her marriage would defeat it. In Brook's Reading, on the Statute of Limitations, p. 150, there is another exception. A. delivers a deed, as an escrow, to J. S., to deliver over on condition performed, before which A. becomes *non compos mentis;* the condition is then performed, and the deed delivered over; it is good, for it shall be A.'s deed from the first delivery. Another exception is in 3 Co. 35 b, 36 a. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after, it is delivered over on condition performed: the lease shall be the deed of the lessor from the first delivery. There is also a strong exception in 5 Co. 85. If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed – here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate; but it shall be deemed consummate by the performance of the condition.

Therefore, if the deeds in this case were delivered to Judge Wells as escrows, and by him delivered over on the death of the grantor, they must take their effect, and be considered as the deeds of the grantor, from the first delivery, he being dead at the second delivery. And the cases in 3 Co. 36 a, and 5 Co. 85, are in point. It may here be observed, that it is not to be presumed that it was the intention of the grantor to deliver these deeds as escrows, to be after delivered as his deeds, on the event of his death; when, from the nature of the event, they could not be considered as his deeds from the second delivery. The presumption is violent that he considered Judge Wells as a trustee of the grantees. But whether the deeds were delivered to him as

escrows, or in trust for the grantees, — in either case the verdict must stand, and the first judgment be entered thereon, namely, that partition be made; and let a warrant issue to commissioners to make partition.[1]

BELDEN *v.* CARTER.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1809.

[*Reported* 4 *Day*, 66.]

MOTION for a new trial.

This was an action of ejectment for five sixth parts of eight several tracts of land, lately the property of Jeremiah Hogaboom, deceased.

The defendant pleaded the general issue.

On the trial, the plaintiffs claimed title as heirs at law of Hogaboom; the defendant, in right of his wife, who was Pamela Griffin, as devisee and grantee. It appeared, that by a will duly executed and attested, dated the 5th of January, 1802, which was afterwards proved and approved, Hogaboom devised these tracts of land to Pamela. On the 3d of December, 1802, he procured another will to be drawn, in which he bequeathed all his personal estate to her, but made no disposition of any of his real estate. This will contained a clause revoking all former wills, but was attested by two witnesses only. At the same time, he procured a deed to be drawn of the demanded premises to Pamela, and one of another form to Calvin Noble. After the will and deeds were executed, the scrivener took up the deeds, and addressing himself to Hogaboom, said, "These you deliver for the purposes therein mentioned." To this Hogaboom made no reply; but, after pausing awhile, turned, and addressing himself to Elizur Wright, Esq. (who had witnessed the deeds and will, and taken the acknowledgment of the former), said, "Take these deeds, and keep them; if I never call for them, deliver over one to Pamela, and the other to Noble, after my death; if I call for them, deliver them up to me." Wright thereupon received the deeds. Hogaboom never called for them; he died on the 3d of June, 1803; and after his death, they were delivered over according to his directions. Pamela was not present at the drawing, execution, or delivery of the deeds, and never conversed with Wright on the subject. Upon these facts, two questions of law arose: first, whether the will of January, 1802, was revoked by the will of December, 1802; and, secondly, whether the delivery of the deeds to Wright, and the delivery of them over by him to Pamela, as above stated, constituted a sufficient delivery to pass the title of the demanded premises to her. The court decided the latter question in the affirmative; and, therefore, deemed it unnecessary to give any opinion on the former. The jury

[1] See *Hathaway* v. *Payne*, 34 N. Y. 92. But see *State Bank* v. *Evans*, 3 Or. 155.

being directed accordingly, found a verdict for the defendant; and the plaintiffs moved for a new trial on the ground of a misdirection.

R. M. Sherman and *Bacon*, in support of the motion.

Daggett and *Gould*, contra.

By the Court. It is unnecessary to decide the question respecting the revocation of the will, as the court are of opinion that the defendant has a good title under the deed.

The grantor delivered the deed to Wright, with a reservation of a power to countermand it; but this makes no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power.

The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is, that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery.

New trial not to be granted.

MAYNARD *v.* MAYNARD.

Supreme Judicial Court of Massachusetts. 1813.

[*Reported* 10 *Mass.* 456.]

This was a writ of *entry sur disseisin*, brought to recover possession of a certain tract of land in Marlborough, wherein the demandant counts upon his own seisin within thirty years, and upon a disseisin by the tenants.

A trial was had upon the general issue, at the sittings in this county after the last October Term, before *Parker*, J., who reports that the demandant's title is unquestioned, unless taken away by a certain deed, now cancelled, which purports to convey the same to his son, Abel Maynard, deceased, under whom the tenants claim to hold the same, the said Nancy being the widow, and the other tenants the children, of the said Abel.

The deed, which purports to have been made by the demandant, for the consideration of 2,000 dollars, and contains the usual covenants of warranty, was made under the following circumstances. In April, 1810, Hezekiah Maynard, the demandant, called upon Benjamin Rice, Esq., who is a subscribing witness to the execution of the deed, and the magistrate before whom it was acknowledged, and told him he wished to make some

provision for his son Abel, and requested the witness to write a deed of the land, being part of the demandant's farm, which is described in the deed. This was done by the witness, who read it to the demandant, and he was satisfied with it. A few days afterwards, he called on the witness, and signed, sealed, and acknowledged the deed; and he requested the witness to take it to the register's office, and get it recorded. The witness carried it to the register accordingly, procured it to be recorded, and, in May following, received it back. The witness informed the demandant of this, who told him it was right, and requested him to keep the deed until it was called for. Abel, the son, was never present at any of these transactions, nor did it appear that he ever knew of the execution of the deed. About a year afterwards, Abel died, and, soon after he was buried, the demandant called upon the witness for the deed, which was given to him, he then saying that he supposed he had a right to do as he pleased with it; and then cut his name and seal from it. It was proved that Abel, the son, lived upon the farm with the demandant, his father, and carried it on with his labor, and supported his family upon it. It was also proved, by several witnesses, that the demandant, in conversation after the execution of the deed, considered the land as his son's property.

The judge instructed the jury that there were no facts proved in the case which, in law, could amount to a delivery of the deed to Abel; so that the conveyance was not perfect, and the demandant must recover possession. A verdict was accordingly returned for the demandant, which the tenants moved might be set aside, and a new trial be granted.

Prescott, for the tenants.

Bigelow, for the demandant.

Per Curiam. It is very clear that there was no delivery of this deed, so as to give it the effect of passing the estate from the demandant to his son, as whose widow and heirs the tenants claim. The act of registering a deed does not amount to a delivery of it: there not appearing any assent on the part of the son, or even any knowledge that the deed had been executed in his favor. A delivery of a deed duly executed and acknowledged, to the register of deeds, aided by a subsequent possession of the deed by the grantee, might be evidence of a delivery to him.

But the facts in the case at bar, testified by the person who acted as the scrivener and magistrate, leave no doubt of the intention of the grantor ultimately to pass this land to his son, but to keep the control over it until he should be more determined upon the subject. He may have chosen to place the deed, perfect as it was, except as to delivery, in the hands of the witness, in lieu of a devise, to operate after his decease; for nothing was wanting to its complete effect but to direct the witness to deliver it to his son after his own decease. He probably chose to consider it as revocable at all times by himself, in case of any important change in his family or estate. Whatever may have been his

views, however, he retained an authority over it; and having reclaimed and cancelled it, the tenants can claim no title under it.

Whether a creditor of his son might not have taken it in satisfaction of a debt, in consequence of the credit given by putting such an apparent title upon record, and especially as the son was in actual possession of the premises, need not now be determined. We are satisfied that the title never passed out of the demandant, and that he is therefore entitled to a recovery.

Judgment on the verdict.[1]

JACKSON d. EAMES *v.* PHIPPS.

SUPREME COURT OF NEW YORK. 1815.

[*Reported* 12 *Johns.* 418.]

THIS was an action of ejectment, to recover 25 acres of land in lot No. 24, part of Scriba's patent, in Oneida County, and also 12 acres of land adjoining, called the Gore. The cause was tried at the Oneida Circuit, in June last, before *Mr. Justice Spencer*. Both parties claimed title to the parcel of 25 acres, under Joseph Phipps, who had been in possession of the premises for a number of years prior to giving the mortgage hereafter mentioned. The declaration was served on the tenant in possession the 9th of May, 1814.

The plaintiff gave in evidence a mortgage of the two pieces of land, dated the 17th of March, 1809, by Joseph Phipps, to the lessor of the plaintiff, to secure the payment of 53 dollars, which was recorded in the office of the clerk of Oneida County, the 14th of April, 1809.

The defendant gave in evidence a deed with warranty from Joseph Phipps, to his brother, Aaron Phipps, the father of the defendant, for 44 acres and a half of land, which included the 25 acres, but not the 12 acres in question; this deed was dated, acknowledged, and recorded, the 27th of January, 1809.

The defendant offered to prove, by his attorney, that the tenant in possession, on the 6th of April, 1814, verbally agreed with him, to hold possession of the 12 acres under the defendant, on a promise to sell to the tenant. This evidence was objected to, but admitted by the judge. It did not appear, however, that the defendant, who resided in Massachusetts, knew of, or consented to, this attornment.

It was proved that Joseph Phipps, being in embarrassed circumstances, in the fall of the year 1808, went to his brother, Aaron Phipps, who resided at Hollistown, in Massachusetts, and agreed to give him a deed of his farm, to secure two notes of about 130 dollars, with the interest, and a small debt due to the defendant. Joseph Phipps, accordingly, returned home, and executed and acknowledged the deed of the 27th of January, 1809, and left it in the clerk's office. Neither the

[1] See *Youngs* v. *Gailleau*, 3 Wall. 636; *Union Ins. Co.* v. *Campbell*, 25 Ill. 267.

grantee, nor any person in his behalf, was present. Aaron Phipps, the grantee, died in the fall of 1809, never having been in this State. In February, 1810, Joseph Phipps sent the deed, enclosed in a letter, to Eli Phipps, the defendant, who, on receiving it, appeared to be surprised; but, on reading the letter, observed, that it was intended to secure the two notes which the said Joseph owed to the grantee, and which the defendant said he then held, as administrator of his father, uncancelled, and that he was disappointed in not receiving the money instead of the deed.

It appeared that Joseph Phipps continued to occupy the premises for about three years after the date of the deed to Aaron Phipps, and then delivered the whole to the defendant, who let them to the tenant in possession. The premises were proved to be worth about 700 dollars.

Joseph Phipps testified, that when he executed the deed to his brother, he informed him, by letter, of a mortgage to one Wager, for about 300 dollars, and another mortgage to the State, on part of the premises, for about 60 dollars; and it was proved that the defendant had paid off those two mortgages.

A verdict was taken for the plaintiff, subject to the opinion of the court on the above case.

N. Williams, for the plaintiff.

Sill, contra.

SPENCER, J., delivered the opinion of the court. The parties both claim title, under Joseph Phipps, to the 25 acre tract. The other tract is described as a Gore: and is included in the mortgage given by Joseph Phipps to the lessor of the plaintiff, but is not included in the deed from Joseph Phipps to Aaron Phipps. With respect to the piece called the Gore, there can be no question. The defendant defends as landlord of the premises, and his only pretence to any title to this part of the premises arises from his having succeeded to the possession under Joseph Phipps. The mortgage to the lessor of the plaintiff comprehending it, and the defendant having no title paramount to the mortgage, there exists no legal defence for this tract.

The date of the deed under which the defendant claims, being prior to the execution of the mortgage under which the plaintiff claims the premises, the former must prevail, if it be well and legally executed.

The objection to it is, that it never was delivered to the grantee, nor to any one, for his use, during his lifetime: and the facts are, that, in the fall of 1808, it was agreed, between Joseph and Aaron Phipps, that the former, who was indebted to the latter, should give him a deed of his farm, to secure the debt; that Joseph executed the deed, acknowledged and carried it to the clerk's office, for recording, on the day of its date, without the grantee, or any person on his behalf, being present, or receiving a delivery of the same; that Aaron, the grantee, died in the fall of 1809, and in February, 1810, the defendant received the said deed, as the son, and, probably, heir, of Aaron.

Under these circumstances, the deed must be considered inoperative. It is requisite, in every well-made deed, that there be a delivery of it. This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing; or it may be by both; but by one or both of these it must be made; for, otherwise, though it be never so well sealed and written, yet is the deed of no force. It may be delivered to the party himself, to whom it is made, or to any other person, by sufficient authority from him, or it may be delivered to a stranger, for, and in behalf, and to the use of him to whom it is made, without authority; but if it be delivered to a stranger, without any such declaration, unless it be delivered as an *escrow*, it seems that it is not a sufficient delivery. 1 Shep. Touch. 57, 58; 2 Black. Com. 307; 4 Viner, 27, § 52. In *Jackson, ex dem. M'Crea* v. *Dunlap*, 1 Johns. Cas. 114, it was decided, that it was essential to the legal operation of a deed that the grantee assents to receive, and that there could be no delivery without an acceptance.

A delivery of a deed, which, we have seen, is essential to its existence and operation, *ex vi termini*, imports that there be a recipient. It would be absurd to hold that a thing was delivered, when there was no person to receive; and, in this case, the grantee died without any delivery to him. Without inquiring, therefore, whether the deed was fraudulent, it is enough that it was never well executed, by delivery.

Judgment for the plaintiff.

RUGGLES *v.* LAWSON.

SUPREME COURT OF NEW YORK. 1815.

[*Reported* 13 *Johns.* 285.]

THIS was a suit in partition, tried before his Honor the Chief Justice, at the Orange Circuit, in September, 1814.

The plaintiff, in his petition, set forth, that he was seised, in fee, as tenant in common, of an undivided moiety of the premises in question; and that Daniel Lawson and others, defendants, as heirs at law of Robert Thomson, jun., deceased, were each seised of an equal and undivided twentieth of the premises, and the widow of Robert Thomson was entitled to her dower in the one third of the said ten twentieths of the premises, of which the heirs of the said Robert Thomson were so seised. Several of the defendants put in pleas of confession, and consented to the partition. Robert Thomson and Nelson Thomson, two of the defendants, pleaded *Non tenant in simul*, and gave notice, under the plea, that they would prove, at the trial, that they were entitled, in their own right, to one half of the premises, and that they claimed title to the same, by virtue of a conveyance to them, dated the 15th of November, 1811, from their father, Robert Thomson (setting forth the deed at length).

At the trial, it was admitted that the plaintiff was seised, in fee, of an undivided moiety of the premises.

Robert and Nelson Thomson, two of the defendants, gave in evidence the deed set forth in the notice accompanying their plea. The deed was given for natural love and affection of the grantor to his two sons, and for the further consideration of one dollar, and conveyed an undivided moiety of the premises. David Mason, a witness, proved, that, in June, 1814, the grantor, being sick, took from his chest the deed in question, among other deeds to his children, which he delivered to the witness, and, at the same time, directed him, in case he should die before making his will, which he had requested the witness to draw up for him, that he, the witness, would deliver the deeds to his children, respectively; the witness, having retired, for a short time, to prepare the will of the grantor, on his return found him dead; and, about a month after his decease, the witness delivered the deeds to the grantees named therein.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case, which was submitted to the court without argument.

PER CURIAM. The only question in this case relates to the effect and operation of the deed from Robert Thomson, jun., to his two sons, Robert and Nelson. This deed was duly executed by the grantor, in his lifetime, and delivered to a third person, to be delivered to the grantees, in case the grantor should die before having made and executed his will. The grantor did die without having made any will, and the deed was, after his death, delivered to the grantees. If this deed is to be considered as an *escrow*, the estate, under the circumstances stated in the case, passed to the grantees, upon the delivery after the death of the grantor. It is a well-settled rule with respect to an *escrow*, that if either of the parties die before the condition is performed, and, afterwards, the condition is performed, the deed is good, and will take effect from the first delivery. (Shep. Touch. 59.) It may, however, be questionable whether this deed is to be viewed as an *escrow*; the grantees had nothing to do, on their part, in order to make the deed absolute, which is usually the case where a deed is delivered as an *escrow*. The delivery here was, at all events, conditional, and to become absolute upon an event which has taken place: and, as in the case of an *escrow*, the deed will take effect from the first delivery. This principle is very fully laid down and illustrated in the cases of *Wheelwright* v. *Wheelwright*, and *Hatch* v. *Hatch*, 2 Mass. Rep. 447, and 9 Mass. Rep. 307. The grantees in this deed are, therefore, entitled to a moiety of the premises, and partition must be made accordingly.

FOSTER *v.* MANSFIELD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported* 3 *Met.* 412.]

THIS was a petition for partition, in which it was alleged that the petitioners were seised, in right of the wife, of several tracts of land therein described, as tenants in common with the respondent. The respondent pleaded that he was sole seised, and that the petitioners were not seised in manner and form as they had alleged. The trial was before the *Chief Justice*, who thus reported the case: —

Both parties claimed under John Mansfield, late of Danvers, deceased. Mary Foster, the female petitioner, and the respondent, were the only children and heirs of said John Mansfield. The petitioners contended that said John Mansfield, senior, died seised of the premises, intestate, and that they descended to his son and daughter in equal shares. The respondent contended that his father conveyed them to him, in his lifetime, by deed; and he gave in evidence a deed from his father to himself, bearing date April 18th, 1839, purporting, in consideration of $1,000 paid, and of love and affection, and other good considerations, to convey the premises to his son in fee, with covenants of seisin and warranty. This deed purported to be attested by Elbridge Gerry and Joseph Shed; to be acknowledged before said Joseph Shed, as justice of the peace; and to be recorded in May, 1839.

The only question, ultimately raised, was as to the delivery of the deed, and its legal effect. There was evidence tending to show that the intestate, a man about seventy years old, and infirm, during his last sickness, after it was intimated to him by some of his friends that he probably would not recover, sent for Dr. Shed, a physician and magistrate, and requested him to write two deeds: one to convey a certain part of his real estate, by him specially designated, to his daughter; and the residue of his real estate to his son; and that the deeds were prepared accordingly, as soon as they could be done; That after the intestate had given his instructions for the deeds, and Dr. Shed had taken minutes for the purpose of preparing them, the intestate told Dr. Shed that he wished to have the deeds executed, and that he Dr. Shed should retain them and deliver them to the respective grantees, after his death: That after the deeds were prepared, which was done immediately in the house, Dr. Shed went back with them to his bedroom, and he again said that he wanted to execute them, and when executed, he wanted Dr. Shed to keep them, and to deliver Mary her deed, and John his: That he then sat up in bed, and signed, sealed, and acknowledged them, and handed them to Dr. Shed; that immediately after, one was executed by his wife, agreeably to his request; that both were attested by Elbridge Gerry and Dr. Shed, and

certificates of acknowledgment written on them by the latter, who put them into his pocket-book, and shortly after went away: That the intestate died on the same day, a short time after the execution of the deeds; and that soon after his death, Dr. Shed delivered the deeds to the son and daughter, respectively, pursuant to the request of the grantor.

The question was, whether this was a good execution and delivery of the deed to the son, to vest the property in the son in the lifetime of the father. The jury were instructed, that if at the time the grantor gave directions for making the deed, and after the deed was drawn and presented to him, but before he had signed and sealed it, he directed and intended, that from and after the execution of the deed, the same should be taken and retained by Dr. Shed, till after his death, and then be delivered to the grantee, his son, and he thereupon signed and sealed the deed, and pursuant to said intent, and without changing his purpose, delivered it to Dr. Shed to be attested and acknowledged, and retained by him without any further act of his, and it was attested, and the acknowledgment certified accordingly, and retained by Dr. Shed, pursuant to such direction and request, till after the grantor's death, and was then delivered to the grantee, it vested the estate in the grantee, from the time of the execution, and the grantor did not die seised. The jury, by consent, returned a verdict for the respondent.

Judgment to be rendered on the verdict, if the above direction was correct; otherwise, the verdict to be amended and entered as a verdict for the petitioners, and judgment for partition rendered thereon accordingly.

N. J. Lord, for the petitioners.

Ward, for the respondent.

SHAW, C. J. Whether, when a deed is executed, and not immediately delivered to the grantee, but handed to a stranger, to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often matter of some doubt; and it will generally depend rather on the words used and the purposes expressed, than upon the name which the parties give to the instrument. Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed, until the second delivery; but when thus delivered, it will take effect, by relation, from the first delivery. But this distinction is not now very material, because where the deed is delivered as an escrow, and afterwards, and before the second delivery, the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity. *Wheelwright* v. *Wheelwright*, 2 Mass. 454. The cases

there cited fully justify this position; and the principle is recognized in *Hatch* v. *Hatch*, 9 Mass. 310.

This principle governs the present case. Mansfield, the grantor, being seised of the land, executed and acknowledged a deed, and delivered it to Dr. Shed, with a request that he would deliver it to the grantee, after his, the grantor's decease; which he did. Then, by relation, the deed took effect, as at the time of the first delivery, and devested the estate of the grantor, as from that time.

It is immaterial to inquire, what would have been the effect, if the grantor had recovered from his sickness and taken back the deed. As the estate did not effectually pass till the second delivery, if that second delivery had been prevented, it would probably have been held that it was wholly inoperative. Nor is it material to inquire whether such deed would have been valid against creditors. Had the deed been executed in the most formal manner, and delivered to the son himself, in presence of witnesses, if made without valuable consideration, it could not avail against creditors.

Judgment on the verdict for the respondent.

MERRILLS *v.* SWIFT.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1847.

[*Reported* 18 *Conn.* 257.]

THIS was a bill for the foreclosure of a mortgage.

The case stated and found was as follows: William Swift, one of the defendants, being the owner in fee of the lands described in the bill, subject to certain prior mortgages, and being also in embarrassed and failing circumstances, on the 11th day of February, 1845, in the absence and without the knowledge of the plaintiff, who then resided in Lee, in the State of Massachusetts, applied to an attorney at law in the city of Hartford, and requested him to draw a mortgage deed of said lands to the plaintiff; which such attorney accordingly did, in conformity with the instructions given him. This deed contained the following condition: "Provided, if I shall well and truly pay to the said William Merrills, on demand, with interest, the sum of 1,500 dollars, which I am indebted to him on book, and by several notes, the exact date and amount not recollected, but amounting in the whole, together with the debt on book, to the sum of 1,500 dollars, or thereabouts, then this deed shall be void." Swift, having duly executed such deed, delivered it to said attorney, for the benefit of the plaintiff, and requested him to cause it to be recorded, and handed it to the plaintiff. The deed was accordingly duly recorded, on the 12th of February, 1845; and some time afterwards, it was received and accepted by the plaintiff.

The plaintiff had previously requested Swift to give him security for

his indebtedness; but there was no agreement on the part of Swift to give the plaintiff any mortgage, prior to the execution of the deed in question.

At the time of the execution of this deed, there was pending in the Superior Court for the County of Hartford, an action at law, in favor of Lemuel Howlett, the other defendant, against Swift, for the recovery of a certain debt against him; which action, at a previous term of the court, had been referred to an auditor, who had made his report, in which he had found that Swift was indebted to Howlett in the sum of 417 dollars, 40 cents. This report, at the time of executing said deed, had not been accepted by the court, but was afterwards, on the 13th of February, 1845, accepted, and judgment was rendered in the action in favor of Howlett, for that sum, and for 84 dollars, 59 cents, costs of suit. On this judgment, Howlett instituted a suit against Swift, and caused said lands to be attached as his property, by writ of attachment, bearing date February 15th, 1845, which was duly returned and entered in the docket of the court, in which it is still pending, and the premises are still subject to the lien created thereby. This attachment was not made, until after said mortgage deed had been executed and recorded, but was made before any delivery of it, by the attorney to the plaintiff, and before the plaintiff had any knowledge that it had been executed.

It did not appear that Howlett, at the time of his attachment, had any knowledge of said mortgage, or of Swift's indebtedness to the plaintiff, except what may be implied from the record of the deed.

At the time of the execution of the deed, Swift was indebted to the plaintiff, by three promissory notes, described in the bill, one dated the 23d of April, 1827, for 429 dollars, 81 cents, payable five days after date, with interest, on which 210 dollars had been paid and indorsed; another, dated the 18th of August, 1843, for 350 dollars, payable at the Farmers and Mechanics Bank, ninety-five days after date; and one dated October 6th, 1844, for 543 dollars, 93 cents, payable four months after date, at the Phœnix Bank, in Hartford; also a book account, on which there was due to the plaintiff 180 dollars, 55 cents; unless such indebtedness is to be barred, so far as Howlett is interested, by the following facts. No evidence was adduced on the trial, to show that the recovery of the sum specified in the first mentioned note, was not barred by the Statute of Limitations, except the testimony of Swift, who was called as a witness by the plaintiff, and testified that it had never been paid, and was still due. With respect to the last mentioned note, the court found, that before the sum due thereon had become payable, the plaintiff had indorsed and assigned it; but finding that Swift was unable to pay it, when it arrived at maturity, the plaintiff sent the money to him, and requested him to go to the bank where it was made payable, and pay it and take it up, and deliver it to him; which Swift accordingly did, with the money so furnished by the plaintiff.

At the time of the execution of the mortgage deed, the two first mentioned notes were in the possession of the plaintiff; but there was no evidence that the last mentioned note had been returned to the plaintiff by Swift, after its payment at the bank, until after the attachment.

The value of the mortgaged premises, over the known incumbrances thereon, amounted to 750 dollars.

The case was reserved upon the question, whether the plaintiff was entitled to any decree, and if so, to what decree, against Howlett, for the consideration and advice of this court.

Hungerford and *Bulkeley*, for the plaintiff.

Towcy and *Goodman*, for the defendant Howlett.

STORRS, J. It is, in the first place, contended by Howlett, the only defendant who appears in this case, that there was no delivery of the deed in question to the plaintiff by Swift, previous to the attachment by Howlett of the land embraced in it. It is essential to the validity of a deed that it should be delivered by the grantor, and accepted by the grantee. A deed takes effect only from its delivery; and there can be no delivery without acceptance, either express or implied. They are necessary, simultaneous and correlative acts. *Jackson d. Ten Eyck et ux.* v. *Richards*, 6 Cow. 617. As there can be no delivery without acceptance, a deed cannot be delivered where there is no person to receive it. *Jackson d. Eames* v. *Phipps*, 12 Johns. R. 421. And it must be delivered as the deed of the grantor, and not to any other intent. "A delivery of the deed is either actual, — *i. e.*, by doing something and saying nothing — or else verbal — *i. e.*, by saying something and doing nothing; or it may be by both. And either of these may make a good delivery and a perfect deed. But by one or both of these means it must be made; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party take it to himself, or happen to get it into his hands, yet it will do him no good, nor him that made it any hurt, until it be delivered." 1 Touchst. 57. Ow. 95. Yelv. 7. 1 Leon. 140. Therefore, a delivery of a deed, where actual and not verbal, does not consist of the mere act of handing or transmitting it either to the grantee or another person, but of that act and of the intention with which it is done; although the possession of it by the grantee may be evidence of the intent with which he received it. It must be delivered to the use of the grantee. In this case, the court finds that before said attachment, Swift executed the deed, and delivered it to a third person for the benefit of the plaintiff, and requested him to cause it to be recorded and handed to the plaintiff, which was accordingly done; although it does not appear that it was received by the plaintiff before the attachment by Howlett. It was, therefore, an absolute delivery by the grantor of the instrument as his deed to a third person for the use of the grantee. These circumstances, according to all the authorities on this subject, constituted a good delivery of the deed to the plaintiff, and immediately vested in him a title

to the land conveyed by it. They all agree, that neither the presence of the grantee, nor his previous authority to a third person to receive it on his behalf, nor his subsequent express assent to it, is necessary to make the delivery of a deed valid. Where there is no such previous authority to receive it, his assent is presumed where the deed is beneficial to him, although his dissent may be shown, and the deed thereby rendered ineffectual. *Camp* v. *Camp*, 5 Conn. R. 291. *Jackson d. Pintard* v. *Ballc*, 20 Johns. R. 184. *Halsey* v. *Whitney*, 4 Mason, 20. But here his express assent is shown by his subsequent reception and acceptance of it. If the deed had been delivered as an escrow, a different question would be presented; but here the delivery was absolute and unconditional. It is said, in the Touchstone, vol. 1, pp. 57, 58, that "a delivery of a deed may be made to the party himself to whom it is made, or to any other, by sufficient authority from him; *or it may be delivered to any stranger for and in the behalf, and to the use of him to whom it is made, without authority*; but if it be delivered to a stranger, without any such declaration, intention or intimation (that is, of the use), unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery." In the present case, there is not only no ground to claim it was delivered as an escrow, but it is found to have been absolutely delivered, and for the benefit of the grantee. We find no case on the subject where the same doctrine is not approbated; and it is expressly sanctioned in many, among which are *Belden* v. *Carter*, 4 Day, 66. *Wheelwright* v. *Wheelwright*, 2 Mass. R. 447. The fact that no time was limited in the present case for the delivery of the deed to the plaintiff, makes it stronger than those which have been cited, in which it was to be delivered over on a future event, viz., the death of the grantor; and where, notwithstanding that circumstance, it was held, that it became the deed of the grantor presently. *Hatch* v. *Hatch*, 9 Mass. R. 307. *Ruggles* v. *Lawson*, 13 Johns. R. 285. *Church* v. *Gilman*, 15 Wend. 656. *Buffum* v. *Green*, 5 N. Hamp. R. 71. *Jackson d. Eames* v. *Phipps*, 12 Johns. R. 418. *Doe d. Garnons* v. *Knight*, 5 B. & Cres. 671. *Exton* v. *Scott*, 6 Sim. 31. In the cases cited by the defendant on this point, either the writing was an escrow, and delivered over before the event happened on which it was to take effect, *Sparrow* v. *Smith*, 5 Conn. R. 113, or, there was no delivery in fact of the writing, as the deed of the grantor, either to the grantee or to any other person for his use; and on these grounds they were held to be inoperative. 12 Johns. R. 418. 10 Mass. R. 456. *Elsie* v. *Metcalfe*, 1 Denio, 323. *Dunton* v. *Perry*, 5 Verm. R. 382. These cases are, therefore, inapplicable to the present.

It is claimed, in the next place, that the debts intended to be secured by the mortgage in question, are not described in it with sufficient certainty to render it inoperative against Howlett, who is a subsequent encumbrancer.

[The learned judge went on to consider this point, and decided in favor of the mortgage. This part of his opinion is omitted.]

The Superior Court is advised to render a decree for the plaintiff accordingly.

CHURCH, C. J., concurred in this opinion.

ELLSWORTH, J., dissented [but only on the ground that the securities were insufficiently described in the mortgage deed. His opinion is omitted.]

WAITE, J., concurred in these views.

HINMAN, J., gave no opinion, not having been present when the case was argued.[1]

HALL *v.* HARRIS.

SUPREME COURT OF NORTH CAROLINA. 1848.

[*Reported* 5 *Ired. Eq.* 303.]

CAUSE removed from the Court of Equity of Montgomery County, at the Spring Term, 1848.

The facts in this case are fully stated in a case between the same parties, *Hall* v. *Harris*, 3 Ired. Equity, 289, and so much of them as is necessary to the understanding of the decision now made is set forth in the opinion of the court here delivered.

Strange, for the plaintiff.

No counsel for the defendants.

PEARSON, J. When this case was before this court at June Term, 1844, it was decided, that an execution does not bind equitable interests and rights of redemption from its *teste*, as in ordinary cases, but from the time of "execution served;" and it was declared that the plaintiff would be entitled to a decree, provided the deed, under which he claimed, took effect before the execution, under which the defendant Harris claimed, was issued. 3 Ired. Eq. 289.

We are satisfied, that the view then taken of the case was correct. The rights of the parties depend upon that single question.

The execution issued on the 7th of March, 1840. The plaintiff alleges, that the deed took effect on the 2d of March, 1840. The facts are, that on the 2d of March the plaintiff and the defendant Morgan made an agreement, by which the plaintiff was to give Morgan $725, for the land, to be paid, a part in cash, and the balance in notes and specific articles, as soon as the plaintiff was able, which he expected would be in a few days, and Morgan was to make a deed to the plaintiff, and hand it to Col. Hardy Morgan, to be by him handed to the plaintiff, when he paid the price. Accordingly on that day the plaintiff paid to Morgan a wagon and some leather, which was taken at the price of $57.50 and Morgan signed and sealed the deed, and handed it to Col. Morgan to be handed to the plaintiff, when he paid the balance of the price. The deed was witnessed by Col. Morgan and one Sanders, and is dated on the 2d of March. Afterwards on the tenth of March,

[1] See *Witt* v. *Franklin*, 1 Binn. 502 (1809); *Shirley* v. *Ayres*, 14 Ohio, 307 (1846).

the plaintiff paid to Morgan the balance of the $725, with the exception of $162, for which Morgan accepted his note, and the deed was then handed to the plaintiff by Col. Morgan.

The question upon these facts is, whether the deed takes effect from the 2d or from the 10th of March? We are of opinion, that it takes effect from the 2d, at which time, according to the agreement, it was signed, sealed, and delivered to Col. Morgan, to be delivered to the plaintiff, when he should pay the price. The effect of the agreement was to give the plaintiff the equitable estate in the land, and to give Morgan a right to the price. The purpose, for which the deed was delivered to a third person, instead of being delivered directly to the plaintiff, was merely to secure the payment of the price. When that was paid, the plaintiff had a right to the deed. The purpose, for which it was put into the hands of a third person, being accomplished, the plaintiff then held it in the same manner, as he would have held it, if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way.

It is true, the plaintiff was not absolutely bound to pay the balance of the price. Perhaps, he had it in his power to avail himself of the Statute of Frauds, and it would seem from the testimony, that, at one time, he contemplated doing so, on account of some doubt as to the title; but he complied with the condition and paid the price. His rights cannot be affected by the fact, that he might have avoided it. If the vendor had died, after the delivery to the third person, and before the payment, the vendee upon making the payment, would have been entitled to the deed; and it must have taken effect from the first delivery; otherwise, it could not take effect at all. The intention was, that it should be the deed of the vendor from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide* and not a contrivance to interfere with the right of creditors, of which there is no allegation in this case, it must be allowed to take effect.

A distinction is taken in the old books, between a case, when a paper, being signed and sealed, is handed to a third person, with these words: "Take this paper and hand it to A. B. as *my deed* upon condition," &c., and a case where these words are used, take "*This deed* and hand it to A. B. upon condition," &c. In the latter case it takes effect presently; while in the former, it is held, in most cases, not to take effect until the second delivery. Touchstone, 58, 59.

The distinction, upon which this "diversity" is made, would seem too nice for practical purposes, to be a mere play upon words. The intention of the parties, whether one set of words be used or the other, is to make it a deed presently, but to lodge it in the hand of a third person, as a security for the performance of some act. If it was not to be a deed presently, provided the condition be afterwards performed, the maker would hold it himself, and the agency of the third person

would be useless. Indeed the idea, that the third person is a *mere agent* to deliver the paper as a deed, if particular words be used, "escrow" for instance, even by the old cases, has many exceptions, and the deed is allowed, in such cases, to take effect. As if the maker dies, as in the case above put; or becomes *non compos mentis*; or, being a *feme* sole, marries; or if the vendor should create any encumbrance, as by making a lease; in all such cases, when the paper was handed to the third person to be *delivered as a deed* upon condition, &c., it is allowed to take effect from the first delivery, in order to effectuate the intention of the parties. In other words, when it can make no difference, the deed takes effect from the second delivery, but if it does make a difference, then the deed takes effect from the first delivery. This entirely yields the question. The last exception cited above, as to the relation of the deed, in cases of "escrow" to avoid a lease, takes in the case under consideration; for it is the same, whether the encumbrance, to be avoided, proceeds from the act of the party, or from the effect of an execution, as the object is to make the deed effectual and to carry out the intention. *State* v. *Pool*, 5 Ired. 105.

But, in truth, the distinction cannot be acted upon — it is merely verbal, and whether one set of words would be used, or the other, would be the result of mere accident. The law does not depend upon the accidental use of mere words "trusted to the slippery memory of witnesses." It depends upon the act, that a paper, *signed and sealed*, is put out of the possession of the maker. It must be confessed (and with reverence I say it), that many of the *dicta* to be found in the old books, in reference to deeds, are too "subtle and cunning" for practical use, and have either been passed over in silence, or wholly explained away.

We are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another upon a condition, which is afterwards complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention, that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time, as, if, no fraud being suggested, the paper is handed to the third person, before the parties have concluded the bargain, and fixed upon the terms; which cannot well be supposed ever to be the case; for in ordinary transactions, the preparation of deeds of conveyance, which is attended with trouble and expense, usually comes *after* the *agreement* to sell.

There must be a decree for the plaintiff, with costs against the defendant Harris.

PER CURIAM. *Decree accordingly.*[1]

[1] See *Price* v. *Pittsburgh, &c., R. R. C.*, 34 Ill. 13.

BLIGHT *v.* SCHENCK.

SUPREME COURT OF PENNSYLVANIA. 1849.

[*Reported* 10 *Pa.* 285.]

CERTIFICATE from the Nisi Prius.

James and Thomas Darrach were tenants in common of certain land in Manayunk. In 1834, Thomas Darrach assigned his estate to Blight and V. L. Bradford, in trust for his creditors. The present action was an ejectment by the assignee. The defendant showed a deed from V. L. Bradford (by his attorney Thomas Bradford) and Blight, assignees of Thomas Darrach, conveying the property to James Darrach. This deed was duly acknowledged the day after its date in 1836, and recorded. One of the subscribing witnesses was the alderman who took the acknowledgment. When this deed was read, the calling of the subscribing witnesses was waived, the right being reserved to show by other testimony, that it was delivered as an escrow, and never absolutely delivered. The authority from V. L. Bradford to Thomas Bradford, as his attorney, was also shown. It seems that there was no special provision on this subject in the assignment. The defendant further proved a conveyance by James Darrach to defendant in 1837, and that the consideration-money was actually paid. It further appeared that, at the time of this conveyance, James Darrach was in the possession of the premises.

To avoid this title, the plaintiff undertook to show that the conveyance to James Darrach was never delivered. For this purpose he called T. Bradford, who proved that he acted as attorney for V. L. Bradford, who then resided in Michigan. The property was sold at auction to James Darrach. One Curtis was mentioned by Blight and Darrach as a proper scrivener, and he was employed. The deeds were all handed to him, and he was to receive the purchase-money, and pay off certain encumbrances. Having received notice that this particular deed was at the alderman's office, with a request to execute it, the witness called at the alderman's late in the day, and found the deed executed by Blight. He then executed and acknowledged it, and left it with the alderman. The next morning he called on Curtis, *with whom he had had no previous conference*, and directed him not to deliver any deeds where money was payable, until the receipt of the money.

The deed was recorded within a month, but the witness had no knowledge of the fact until February, 1837, which was after the conveyance to defendant.

The defendant further gave evidence of a covenant by the assignees of Thomas Darrach, not to issue execution on a judgment obtained against James Darrach, upon the estate he had in the premises (being

those now in question), at the time of the recovery of their judgment. This was, however, immaterial, since the judgment was prior to the conveyance by the assignees, and he had an undivided interest in the land to which the averment of title was referable.

The plaintiff further proved by Thomas Bradford, that he had not received the purchase-money from James Darrach, and he believed that neither V. L. Bradford, Blight, nor Curtis had received it.

Gibson, C. J., instructed the jury, that the assignees might convey by attorney, though there was no express power to that effect in the assignment; but, if the deed was delivered as an escrow, to be delivered over on payment of the purchase-money — and that had not been paid — the delivery by Curtis was a nullity, and the deed void, as well as to defendant as to Darrach, the party who obtained it by fraud; and that the evidence of Bradford fully proved it was delivered as an escrow.

Cuyler, for plaintiff in error.

V. L. Bradford and *Scott*, contra.

ROGERS, J. In *Sourerbey* v. *Arden*, 1 J. C. R. 240, it is ruled, that the declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed, or of conditions annexed to it, to be effectual, must be made at the time of executing it. That if, at the time of executing a deed, there was no delivery or intention to deliver — these are facts which should be explicitly proved by the grantor. If, therefore, the acts and declarations of Mr. Bradford, at the time of the execution and acknowledgment of the deed, amounted to a delivery, his subsequent conduct the next day cannot affect or divest the title. The question must be examined in reference to that point of time, throwing entirely out of view what the witness proved afterwards took place.

The 5th section of the Act of 1715 enacts, that all recorded deeds, &c., shall have the same force and effect for giving possession and seisin, and making good the title and assurance of lands, tenements, and hereditaments, as deeds of feoffment with livery of seisin, or deeds enrolled in any of the king's courts of record at Westminster have, in the kingdom of Great Britain.

Now, although recording the deed is not an absolute delivery, but only evidence of it, as is ruled in *Chess* v. *Chess*, 1 Penna. 31, yet, as the fact of delivery is the assurance of the title in the hands of an innocent purchaser, it is entitled to great weight and consideration. A purchaser for value has a right to act on the faith that it has been signed, sealed, delivered, and acknowledged, as it purports to be, in proper form and by proper parties. He cannot suppose it was surreptitiously taken from the grantor, and put on record by circumvention and fraud; and hence, as is decided in *Sourerbey* v. *Arden*, already cited, before he can be deprived of his property, the facts which avoid his title must be proved by the grantor by the most unexceptionable testimony. Has the plaintiff made out such a case as avoids the deed, depends mainly on the testimony of Mr. Bradford, who proves that he

went to the office of the alderman, found the deed there already executed by the co-assignee; that he signed and acknowledged it himself, without any qualification, and went away, leaving the deed where he had found it. It is true, he went the next day to the office of Curtis, the agent of both parties, and told him not to deliver any of the deeds, where the purchasers were to pay money, until he received the money. If the act of Mr. Bradford, at the office of the alderman, was in law a delivery, his subsequent acts can have no effect in divesting a title already vested in the grantee: 1 J. C. R. 240. That the delivery was complete when the grantors declared, before the proper officer, that they signed, sealed, and delivered the deed, without saying or doing anything to qualify the delivery, is well settled on authority. If the grantee had been present at the time, either personally or by agent, no person would doubt that the title vested; but it is ruled, that this will not prevent it taking effect as a good deed. Thus, in *Garmons* v. *Knight*, 5 B. & C. 671, and *Lloyd* v. *Bennett*, 8 C. & Pay. 124, the principle deduced by Mr. Justice Bayley, in a most elaborate review of all the authorities, is, that when an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party — nothing to show that he did not intend it to operate immediately — that is a valid and effectual deed, and that delivery to the party who is to take by it, or any other person for his use, is not essential.

But this case, be it remarked, is stronger than the case cited; for there was not only a complete and unconditional acknowledgment of the signing and delivery, but the grantor did not even retain the deed, but left it with the magistrate. Sheppard, in his Touchstone, p. 57, lays it down that delivery to a stranger will be a sufficient delivery if he has authority to receive it, or if made for the use and on behalf of the grantee. Delivery to a third person for the use of the party in whose favor the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the *instant* of such delivery, although the person to whom the deed is so delivered be not *the agent* of him to whose benefit the deed is made. Can there be any question, says Bayley, J., in *Garmons* v. *Knight*, that delivery to a third person for the use of the party in whose favor the deed is made, when the grantor parts with the whole control over the deed, makes the deed effectual, from the *instant* of such delivery? The law will presume, if nothing appears to the contrary, that a man will accept what is for his benefit. The cases cited show conclusively that the presence of the grantee is not essential; nor does it alter the case, that the magistrate was not the agent of the grantee. The delivery is good, notwithstanding if he parts with all control over the deed; if he parts with it without any qualification, the title vests from the instant it is so delivered. It is not pretended that at the time the deed was signed, sealed, delivered, and acknowledged, there was any condition, qualification, or explanation whatever.

The condition or qualification, if any, was made to Mr. Curtis on the following day; but that was too late, as it was not until the title was vested in the grantee. To the same effect is *Lloyd* v. *Bennett*, 8 C. & P. 124. There a person made a deed of gift of all his real estate to his daughter; he signed and sealed it, and no one being present but the attesting witnesses he said: "I deliver this as my act and deed." After this he desired a third person to keep it, and not deliver it to his granddaughter till he was dead, it being suggested to him that she might otherwise take his property from him in his lifetime; it was held that the delivery of the deed was complete. It is contended with great force that the deed being perfect in form and complete, it being duly recorded and the grantee in possession, a third party having innocently invested his money on the faith of such circumstances, it rested on the plaintiffs to show strictly that the condition, if any, was not complied with. The plaintiff in error insists that the grantee ought to show that Blight did not deliver the deed, that he had not received the purchase-money, or that Curtis had not received it. We deem these facts important, and are of opinion that the burden of proving this was thrown on the grantor. There was no evidence that the deed had not been delivered by Blight, one of the grantors; that he had not received the purchase-money, except what amounts to little, if anything, that he does not charge himself with it in a subsequent and separate account: nor was there any evidence that Curtis had not received the purchase-money, except the testimony of Mr. Bradford, that he never accounted for it to him, nor, so far as he knew, to any other person. As the burden of proof is on the grantor, he must establish these facts, even if it be necessary to examine Mr. Darrach for that purpose. If the attesting witnesses had been present at the time of the execution of the deed before the alderman, they must have been called by the grantor: *Markley* v. *Swartzlander*, 8 W. & S. 172; but as they were not present, a *condition* attached to the delivery at that time, may, I agree, be proved by others, as the alderman, for example.

But it is unquestionable law, that a deed cannot be made an escrow by any other declarations than are made at the time of signing and executing the instrument. This is so held, in effect, in *Somerby* v. *Arden*, 1 J. C. R. 240, where it is ruled, as has been already said, that the declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed, or of a condition annexed to it, to be effectual, must be made at the time of executing it. It is the duty of the grantor, as the Chancellor truly says, to speak then, and declare his intentions, if any he has, inconsistent with the natural and necessary result of the solemnity.

The general principle of law is, that the formal act of signing, sealing, and delivery, is the perfection and consummation of the deed; and it lies with the grantor to prove clearly, that the appearances were not consistent with the truth.

The presumption is against him, and the task is on him to destroy

that presumption by clear and positive proof that there was no delivery, and that it was so understood at the time.

But, granting the deed was deposited with Curtis, as an escrow, to be delivered only on the performance of a special condition, and, in violation of his instructions, he delivered the deed without exacting payment, does that avoid the title of the defendant, who is a *bona fide* purchaser, without notice? This is the next question. The first reflection which strikes us is, that, if a title may be avoided under such circumstances, no purchaser is safe. This is a strong case, for here the defendant is an innocent purchaser for value. He invests his money on the faith of the solemn acts and declarations of the plaintiff. These acts and declarations were made before a magistrate, duly empowered for that purpose, certified to by him in proper form, duly recorded on the records of the county, which, by the Act of 1715, is to have the same force and effect for giving possession and seisin, and making good the title and assurance of the law, as a deed of feoffment, with livery of seisin, &c. Moreover, it appears that, at the time of the purchase, the vendee was in the actual possession of the premises. There was, therefore, nothing to put him on his guard. It must require a very strong case, as the plaintiff in error justly contends, to permit a grantor to aver against the confidence thus reposed in his acts and declarations, exactly the opposite of those acts and declarations: to say, after acknowledging before the proper officer of the law, that he delivered the deed, that he never delivered it, and having acknowledged that he received the purchase-money, that he never received it. The case of *Pratt* v. *Holman*, 16 Verm. 530, is in point. That case rules that, where the grantor in a deed of land delivered the deed to the agent of the grantee, with directions not to deliver the deed without payment by the grantee of a sum of money, and the agent delivered the deed to a third party, for the grantee, such third person promising to pay the grantor the sum claimed, that the deed became operative, and there was a sufficient delivery, notwithstanding the agent did not comply with his instructions. Chief Justice Williams considered it a very plain case. It is not necessary for us to go as far as this case extends, for the delivery was held complete as between the grantor and grantee, the court saying, the remedy is against the grantee to recover the sum unpaid, in a proper action. But, if the title is good, as between the immediate parties to it, and that it is so, unless the transaction is tainted with fraud, I have no doubt, how much more so in the case of an innocent purchaser! The defendant is in possession, and has, moreover, a legal title: the plaintiff cannot succeed, except by showing not merely an equal, but a superior equity. But his only equity is, that he has not received his purchase-money; and, as the plaintiff justly contends, his equity is equal, for he has paid his purchase-money. But, where the equities are equal, as has been often decided, the legal title must prevail. It is a wholesome maxim of the law, that, where one of two innocent persons must suffer a loss, and *a fortiori*

in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it. A party who enables another to commit a fraud is answerable for the consequences; so, if a party says nothing, but, by his expressive silence, misleads another party to his injury, he is compellable to make good the loss, and his own title is made subservient to the confiding purchaser. This is text law: Stor. Eq. § 388, 389; 1 Fonb. Eq. b. 1, c. 8, § 4, n.

Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor.

If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary to them [? it].

But this principle must not be extended to a person who has no possible means of protecting himself, who acts on the presumption that the records of the county are not intended to mislead, but speak the truth, that the acts and declarations of the grantor are such as they purport to be. If the grantor is injured by the conduct of his agents, the remedy is against them; surely there is no reason that it should affect an innocent purchaser, who pays his money on the faith that his title is good. Nor is it any answer that he may protect himself by proper covenants. This, in many cases, may be impracticable, and would amount to this, to discourage all sales or transfers of property whatever. This case was ruled on the idea that the title of the original purchaser was void. The court instructs the jury that the hinge on which the case turns is, whether Darrach got the deed from Curtis without paying the purchase-money. "If you find he did, it is my business to tell you the deed is worth no more in his hands than a blank sheet of paper, and the defendant cannot make title to it, whether he knew of the original defect or not. Without delivery by the grantors, or some one authorized by them, the deed is imperfect, or rather no deed at all, and it cannot be delivered on the authority of the grantors, except on the condition prescribed by them." Again, the court say that "if he (Curtis) delivered the deed without having received the purchase-money, it was an incomplete deed, or rather no deed at all, and it would remain so, even in the hands of an innocent purchaser, to this day; and I say to you, by way of direction, as matter of law, of which it is the business of the court to judge, that it would confer no title on defendant or to anybody else." But this is an erroneous view of the law, for, as is ruled in *Pratt* v. *Holman*, the deed is operative, there being a sufficient delivery, notwithstanding the agent did not comply with his instructions. It is not the case of condition, but the ordinary case of a breach of instructions, which at most makes the deed voidable, but not void.

The agent has the power to deliver the deed, and when he does not

comply with his instructions, he becomes answerable to his principal. If this principle be sound, the deed would be void by the omission to receive one cent of the purchase-money, — a proposition which would shock the common-sense of every man.

It would be incapable of confirmation, as, in the language of the Chief Justice, it would be no deed at all — a mere sheet of blank paper, conferring no title on the original purchaser, or on an innocent purchaser from him. On this branch of the case, the defendant in error relies on *Van Amringe* v. *Morton*, 4 Wh. 382, and *Arrison* v. *Harmstead*, 2 Barr, 195, the former of which he contends to be, on all fours, in principle with the ruling of the Chief Justice in the present case. With all due respect, I must say, I see but little resemblance between the cases. That case was ruled on the principle that the deed was void, there being no delivery at all, either by the grantor himself or by any person having the semblance of authority. The point decided in that case is that if a deed which has been executed and acknowledged by the grantor, with a blank for the grantee's name, be surreptitiously and fraudulently taken from the grantor's house, and the blank filled up, no title passes, and a *bona fide* purchaser, for a valuable consideration, from the person holding the deed, stands in no better situation than such fraudulent holder, especially if the original grantor remains in possession of the property. In the first place, be it remarked, the deed was incomplete, being executed by the grantor with a blank, negativing all idea of a formal delivery. The deed was fraudulently taken from his possession, by a person not having the slightest authority to do so; the blank filled up by him, and delivered to the grantee. It is true the deed was kept by the grantor locked in his drawer, and that he trusted the key to his brother, who was induced by the grantee to fill up the deed and deliver it to him, without the grantor's knowledge or consent, and contrary to his instructions at the time he trusted the key to him. There was, therefore, no power in him, general or limited, and there was no such negligence or default in the grantor as could postpone his rights; for the mere custody or superintendence of property, as in the case of a servant or friend, gives no authority to dispose of it, either express or implied.

The deed was simply void. Besides, the case shows that the original grantor remained in the possession, which, of itself, served to put the purchaser on inquiry. In *Van Amringe* v. *Morton*, the deed as between the grantor and grantee, was a mere nullity — a blank sheet of paper — no deed at all. As, then, the grantee, who was himself a party in the fraud, had not even a semblance of title, he could pass none to another, although that person was an innocent purchaser for value. In *Van Amringe* v. *Morton*, the distinction is taken between a void and voidable deed, in reference to its effect on an innocent purchaser. On that distinction it was that the case of *Price* v. *Junkin* was ruled, 4 W. 85. It is also applicable to all cases of fraudulent sales; for, although the title is a voidable one, as between the original

parties, yet, as respects a subsequent and innocent purchaser, the title is good.

We perceive no error in charging that, as an act of confirmation, the covenant not to issue execution has no effect. The covenant extends only to the real estate situate in the County of Philadelphia, of which the said James Darrach was seised or possessed at the time the judgment was obtained. The property in question did not pass to James Darrach until after the rendition of the judgment. It was after acquired property, according to the defendant's own showing. Besides, Mr. Bradford testifies, that, at the time he executed that instrument, he was ignorant of the fact that Darrach had obtained possession of the deed, &c., without payment of the purchase-money.

Judgment reversed, and a venire de novo awarded.

MITCHELL *v.* RYAN.

SUPREME COURT OF OHIO. 1854.

[*Reported* 3 *Ohio St.* 377.]

RESERVED in the District Court of Perry County.

The action is one of ejectment, and is in this court by agreement of parties, on the facts appearing in the notes of Judge Whitman taken at the trial in the Common Pleas, and the deposition of Margaret Shanon. From the judge's notes, it appeared that the plaintiff first offered a deed from Owen Shanon to Ellen Shanon, for the land in controversy. This deed, dated April 2, 1838, was left with the recorder of Perry County, April 6, 1838, and was actually recorded, April 11, 1838. It was agreed that Owen Shanon was the common source of title. The marriage of Ellen Shanon to John Mitchell, January 7, 1840, was admitted. Her death was also admitted. The possession was admitted always to have been in Owen Shanon, or the defendant Ryan. The defendant offered in evidence a deed from Owen Shanon and wife, to him, Ryan, dated July 27, 1847, recorded February 14, 1850. Owen Shanon, the grantor, testified in substance as follows: "Ellen Shanon was my daughter; at the time of the deed to her, she was in the East: she knew nothing of it; no consideration passed, and she never had any knowledge of the conveyance; she was born in 1823; a year after the execution of the deed, she came to Ohio; she was married in about two years after the conveyance; at this time I was in possession: I continued in possession until I contracted to sell to one Kinney; he took possession and made improvements; left, and gave up the contract; then Patrick Haughran went in under verbal contract with me, and made improvements; he left; I then sold to Timothy Ryan; he paid me two hundred dollars; Ryan never moved on the place; my

daughter lived a mile from the place after her marriage; she died last spring or fall."

It was agreed that the taxes were always paid by Shanon till the sale to Ryan.

Henry Green testified that a short time before the last term of the court, Mitchell had no knowledge of the deed to his wife; Duffy told him; this was just about the time of the death of the wife.

Owen Shanon being recalled, testified that he sent the deed by mail, from McConnellsville to Somerset, to be recorded; it came back in the same way; he kept the original deed till it was lost.

The deposition of Margaret Shanon was in substance as follows: "I am a sister of Ann Ryan, wife of the defendant, and also of Ellen Mitchell, deceased, wife of John Mitchell. Ellen lived in New York, before she came to Ohio; she was the last of father's family who came; he sent fifty dollars to bring her out; had no knowledge of her owning any land in Perry County previous to her death; I was with her off and on for two years before her death, she being sick; she had not enough of the necessaries of life; she had nothing that was nourishing, but did not complain, because she thought her husband was poor; she and Mitchell, after they left McConnellsville, lived on a farm owned by Mitchell and his father, until it was sold to P. Fagan; they then moved on to Carons' farm, where they lived about a year, and until she died; that farm had cleared land, but they lived in a small log-cabin in the woods; during that time Carons and they fell out, and she wanted to move on an eighty-acre tract adjoining father's farm; she told me that if Fagan would pay his notes, according to promise, they would buy a nice little place, if only 40 or 80 acres; I am acquainted with the place in dispute; during the time my sister lived in the neighborhood, Kinney lived on it; next, Joseph Perril, who occupied it at least during one crop; after him, was Patrick Haughran, who raised on it, I think, more than one crop; Ryan then had it; he rented it to Dawson, and afterward to Dew, who now occupies it; it had on it, at the time of my sister's death, two houses and a stable, and a considerable of the land was cleared; never heard her or John Mitchell say anything about owning it; it would have afforded a more comfortable place to live in, than that where she died; Ellen knew all about the sales and the renting of the place by father; I told her all about it; she asked me how much father got of Ryan for it; told her $200; Ellen had no property with which to purchase land before her coming to Ohio, or previous to her marriage; William, Michael, and Mary Ann, plaintiffs in this action, were the only children Ellen left."

Hanna, for the plaintiffs.

Rich and *Spencer*, for the defendant.

THURMAN, C. J. The decision of this case depends upon the question whether the recorded instrument, purporting to be a deed from Owen Shanon and wife, to Ellen Shanon, was ever, in contemplation of law, delivered.

As the Statute provides that copies from the records of deeds, duly certified by the recorder, and under his official seal, "shall be received in all courts and places within this State as *prima facie* evidence of the existence of such deeds," it is very clear that the record of a deed is *prima facie* evidence of its delivery; since, without delivery it cannot exist as a deed. Swan's Stat. (new ed.) 310, § 10. To the same effect are the authorities: *Steele* v. *Lowry*, 1 Ohio, 74; *Foster's Lessee* v. *Dugan*, 8 Ohio, 87; *Hammell* v. *Hammell*, 19 Ohio, 18; *Jackson* v. *Perkins*, 2 Wend. 317; *Gilbert* v. *N. Am. Ins. Co.*, 23 Wend. 46.

It is also clear that this presumption may be rebutted by proof. For the Statute makes the record *prima facie* evidence only, for the obvious reason that it may be the result of accident, mistake, or fraud. And being the act of a mere ministerial officer, there is no reason why it should not be subject to explanation. See the cases above cited, and also *Chess* v. *Chess*, 1 Penn. 32, and *Jackson* v. *Schoonmaker*, 4 Johns. 163.

It was therefore proper for the defendant to introduce such rebutting testimony; indeed, it was indispensable for him to do so, as the burden of proof that a recorded deed was not delivered rests upon the party attacking it.

He accordingly called Owen Shanon, the grantor, who testified as follows: —

"The grantee, Ellen Shanon, was my daughter; at time of deed to her in 1838, 2d April, she was in the East; she knew nothing of it; no consideration passed, and she never had any knowledge of the conveyance; she was born in 1823; she was fifteen years old when the deed was executed; she came to Ohio in a year afterward; was married in about two years after the conveyance; at this time I was in possession, and I continued in possession until I contracted to sell the land to Kinney; he took possession, made improvements, left and gave up his contract; then Patrick Haughran went in under a verbal contract with me, and made improvements; he left; I then sold it to Timothy Ryan, the defendant; he paid me $200 agreed to; that was the consideration; Ryan never moved on to the place; Ryan agreed to sell to Duffy; the legal title is in Ryan, and he is in possession by Duffy; my daughter (Ellen) lived a mile from the place after her marriage; she died in January or February, 1852; she never had any notice of the conveyance; I sent the deed by mail from McConnellsville to Somerset to be recorded; it came back the same way; I kept the deed until it was lost."

Other testimony was given by the defendant tending to prove that the grantee, Ellen, knew of the control over the property exercised by her father, and of his several contracts in relation to it; and that she made no objection, nor asserted any claim; but the same testimony strongly tended to establish that she never had any knowledge of the conveyance; nor did her husband know of it until after her death, and after the sale to Duffy. It was also agreed that Owen Shanon paid

the taxes upon the land until he sold to Ryan. Upon this testimony, the first question for our consideration is, With what intent did Owen Shanon send the deed to the recorder to be recorded? Did he thus deliver it for the use of the grantee, and to pass the title to her immediately, or had he some other intent?

That a delivery of a deed to a stranger for the use of the grantee may be a sufficient delivery, is well settled. 1 Shep. Touch. 57, 58; 12 Johns. 421.

But it is said in the Touchstone that if such a delivery be made without a declaration of the use, it seems it is not sufficient. The reason of this is very obvious. If the deed be delivered to the grantee, the natural presumption is that it is for his use, and no words are necessary. But if it be handed to a stranger, there is no such natural presumption; and hence, unless there be something besides the mere act of delivery to evidence the intent, it is impossible to say that the grantor designed to part with the title. For the delivery may be by mistake, or for mere safe-keeping, or for some other cause wholly independent of a purpose to transfer the estate.

But while it is thus apparent that the mere act of delivery to a stranger is insufficient, it is equally clear that there is no precise form of words necessary to declare the intent. Anything that shows that the delivery is for the use of the grantee is enough. For the real question is, Does the grantor by his act mean to part with his title? And whatever satisfactorily manifests this design is as good as an explicit declaration. Now it does seem to us that when a man executes and acknowledges a deed and delivers it to the recorder, with unqualified instructions to record it, as was done in the present case, the reasonable presumption, in the absence of any rebutting circumstance, is that he means thereby to transfer his title. And this presumption is powerfully strengthened when, as in the case before us, the grantee is a minor child of the grantor, and is at a great distance from him, so that the deed cannot be delivered to her in person, and when, too, the circumstances tend to show that it is a gift, and a reasonable one, for aught that appears, for the grantor to make.

It is argued, however, that there are circumstances in proof that rebut the idea that Shanon, when he caused the deed to be recorded, meant to part with his title; and we are referred to his subsequent possession of the instrument, to his subsequent control of the property and contracts to sell it, and to the failure of the grantee, or her husband, to assert any claim to the land before the commencement of this suit.

As to the last circumstance, it is explained by the fact that the grantee died without any knowledge of the deed; nor did her husband know anything about it until just before this suit was commenced. No inference, therefore, can be drawn from their silence. What weight, if any, should be given to the fact that the grantor never communicated to either of them the existence of the conveyance, is another matter.

Much stress has sometimes been laid upon the fact of the grantor's

possession of a deed after an alleged delivery of it; and it has been said that such subsequent possession is a very pregnant circumstance to show that the supposed delivery was not absolute. That this may often be the case is undeniable; but where the deed has been recorded, such subsequent possession is evidently entitled to much less consideration than where it has not. An unrecorded deed is the sole evidence of title, and it would be unsafe and altogether unusual to leave it with the grantor after its delivery. But a recorded deed is not the sole evidence. The Statute makes the record also proof, and a copy of it is admissible, even though the party offering it has the deed itself in his possession. Hence, with us, people have been proverbially careless about their deeds after they are recorded, and often, if not generally, seem to attach more importance to the record than to the original. Add to this that the grantor, Owen Shanon, was the father of the grantee, Ellen; that she was a minor, and away from home several hundred miles when the deed was recorded, and that she remained away for about a year, and it seems to us that but little, if any, importance ought to be attached to his subsequent possession of the instrument. He was her natural guardian, and there was nothing strange in his having the custody of what belonged to her, even though it was a deed in which he was the grantor.

Waiving the question, whether the subsequent acts of ownership, exercised by Owen Shanon, in respect to the land, and his failure to communicate the existence of the deed to his daughter, are admissible evidence to prove that it was not his design to transfer the title to her when he caused the instrument to be recorded, we are inclined to the opinion, after a consideration of the whole case, that the testimony rather tends to prove a change of his mind subsequent to the delivery to the recorder, than to establish that it was not then his purpose to convey the estate. If it had been his purpose when he made the delivery, to retain any control over the property, it is reasonable to suppose he would have declared such purpose to some one; if not to the recorder, at least to some member of his family, or to some friend. He was aware that by causing the deed to be recorded, he would, *prima facie*, be divested of his title, and it is not very reasonable to suppose that he would make such a *prima facie* case against himself, without taking some precaution to enable him to rebut it, if he did not mean to do what his act purported. But this is not all. He was called as a witness, and testified. When he did so, he had the strongest motives to state that he did not mean, by the execution and recording of the deed, to part with his title. For he had subsequently conveyed the land to Ryan with warranty, and if he made that conveyance wilfully and corruptly, knowing that he had no title, he committed no less than a penitentiary offence. Yet he uttered not one word to explain the intention with which he sent the deed to the recorder. Nor did the defendant venture, so far as appears, to put a question to him touching his intent. Why this silence of both witness and party? Why this

failure to prove what the interest of both required to be proved? Why this neglect to make a successful defence? It seems to us there is but one answer we are authorized to give to these questions, and that is, that the question was not asked, because the answer would have been unfavorable, and, for the same reason, there was no unasked statement by the witness. This is the ordinary presumption where a party fails to offer proof of what he ought to prove, if it exist. It is almost incredible that, in the case before us, the defendant would fail to ask, and the witness to state, whether it was the intention to convey the land, if that intention had not in fact existed. The very object for which the witness was called was to prove that the deed was never delivered, but instead of asking him directly for what purpose he caused it to be recorded, the defendant contents himself with proving circumstances, from which he asks the court to infer the purpose.

We suppose the truth to be, that the deed was sent to the recorder to be recorded in order to vest the title in the grantee, and make the property hers; but, that afterward, the grantor changed his mind, and concluded not to give it to her. And, it is altogether probable, assuming the deed to be a gift, that he supposed he had a right to revoke it. This view reconciles his conduct perfectly, without imputing to him any wrong motive at any time, and it is the only view that, upon the testimony, we feel at liberty to take.

And here I would remark, that very clear proof ought to be made, to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title. If such deeds could be overthrown by slight testimony, a door would be open to the grossest fraud. The testimony should, therefore, do more than make a doubtful case. It should establish clearly, that the delivery for record was not for the use of the grantee.

But it is urged, that even if Owen Shanon did intend to part with the title, yet the delivery was insufficient, because it was never accepted, or assented to by the grantee; and it is said that every sufficient delivery includes such assent or acceptance, for no one can be made a grantee without his consent.

It is true, that judges have said, with more solemnity than I think the occasion warranted, that no one can have an estate thrust upon him against his will, and that, consequently, a delivery of a deed to a stranger, for the use of the grantee, is of no effect, until assented to by the latter. How much weight this argument is entitled to, may be judged of by the fact that estates are every day thrust upon people by last will and testament; and it would certainly sound somewhat novel to say that the devises were of no effect until assented to by the devisees. If a father should die testate, devising an estate to his daughter, and the latter should afterward die without a knowledge of the will, it would hardly be contended that the devise became void for want of acceptance, and that the heirs of the devisee must lose the estate.

Neither will it be denied that equitable estates are every day thrust upon people by deeds, or assignments, made in trust for their benefit, nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the Statute of descent, and we begin to estimate the value of the argument, that a man shall not be made a property holder against his will, and that courts should be astute to shield him from such a wrong.

It is certainly true, as a general rule, that acceptance, by the grantee, is necessary to constitute a good delivery, for a man may refuse even a gift. But that such acceptance need not be manual is equally true, and it is also certain that simple assent to the conveyance, given even before its execution, is a sufficient acceptance. Thus, where a vendee had fully paid for the land and was entitled to a conveyance, and his vendor, without his knowledge, executed the deed and delivered it to a stranger, not of the vendee's appointment, for the use of the latter, it was held that the delivery was sufficient and the deed took effect immediately, although the vendee was wholly ignorant of what was done. *Church* v. *Gilman*, 15 Wend. 656. So, patents for the public lands are held to take effect as soon as issued, though they may never come to the grantee's hands, and were issued without any specific application for them.

But the cases go still further, and, upon the soundest reasons, hold that where a grant is plainly beneficial to the grantee, his acceptance of it is to be presumed in the absence of proof to the contrary.

It is argued, however, that this is only a rule of evidence, and that where the proofs show that the grantee has never had any knowledge of the conveyance the presumption is rebutted.

If this argument were limited to cases in which an acceptance of the grant would impose some obligation upon the grantee, I am not prepared to say that I would object to it, although the obligation might fall far short of the value of the grant. But where the grant is a pure, unqualified gift, I think the true rule is that the presumption of acceptance can be rebutted only by proof of dissent; and it matters not that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he *did* know of and *rejected* it. If this is not so, how can a deed be made to an infant of such tender years as to be incapable of assent? Is it the law that if a father make a deed or gift to his infant child, and deliver it to the recorder to be recorded for the use of the child, and to vest the estate in it, the deed is of no effect until the child grow to years of intelligence and give its consent? May the estate, in the meantime, be taken for the subsequently contracted debts of the father, or will the Statute of Limitations begin to run in favor of a trespasser upon the idea that the title remains in the adult? Or, will the conveyance entirely fail, if either grantor or grantee die before the latter assent? I do not so understand the law. In such a case, the acceptance of the grantee is a presumption of law arising from the

beneficial nature of the grant, and not a mere presumption of an actual acceptance. And for the same reason that the law makes the presumption, it does not allow it to be disproved by anything short of actual dissent.

I am fully aware that these views may seem opposed to many decided cases, but they are fully sustained by others that stand, in our judgment, upon a more solid foundation of reason. The strictness of the ancient doctrine, in respect to the delivery of deeds, has gradually worn away until a doctrine more consistent with reason and the habits of the present generation now prevails. *Snider* v. *Lachenour*, 2 Ired. Eq. 360; *Ellington* v. *Currie*, 5 Ired. Eq. 21; *Church* v. *Gilman*, 15 Wend. 656; *Tate* v. *Tate*, 1 Dev. & Bat. Eq. 26; *Monon* v. *Alexander*, 2 Ired. Law, 392.

It remains to be considered whether the deed in question was of that beneficial nature to the grantee, as to give rise to the presumption of which I have spoken.

Upon its face it purports to be for a pecuniary consideration paid to the grantor. *Prima facie*, therefore, it was neither a gift nor advancement. But the proof satisfies us that the grantor never received or expected any pecuniary consideration for it. If he intended that his daughter should have the land, he intended it as a gift. I have already said that upon the testimony we feel bound to say that he did intend to convey it to her, and we must therefore consider the deed as a gift. Applying, then, the principles we have recognized, the title vested in Ellen Shanon when Owen Shanon caused the deed to be recorded. She was seised of it during her intermarriage with the lessor of the plaintiff, there was an issue of the marriage, and she died before the commencement of this suit. According to the decision in *Borland's Lessee* v. *Marshall*, 2 Ohio St. 308, the lessor of the plaintiff became tenant by the curtesy, even if the lands were adversely held during the coverture. It follows that the plaintiff is entitled to judgment.

SMITH *v.* SOUTH ROYALTON BANK.

SUPREME COURT OF VERMONT. 1859.

[*Reported* 32 *Vt.* 341.]

BILL IN CHANCERY. From the bill, answers and testimony, it appeared that in August, 1856, Daniel Tarbell, Jr., then a director in the South Royalton Bank, a corporation organized under the general banking law of 1851, requested the orator, Spencer Smith, to execute to such bank a bond and mortgage of his home farm in Tunbridge to enable the bank, by an assignment of such bond and mortgage to the treasurer of the State, under the provisions of that law, to obtain an

increased issue of their registered bills; that Tarbell promised to pay Smith seventy dollars per annum for the use of his farm for that purpose, and also agreed to furnish him a bond from one Pierce, indemnifying him against any loss by reason of the execution of such bond and mortgage; that Smith, in reliance upon this agreement, executed a bond to the South Royalton Bank, in accordance with the provisions of the general banking law, for twenty-four hundred and eighty dollars, payable in 1865, with interest semi-annually, and the orators executed a mortgage of their home farm to secure the payment of this bond; that this bond and mortgage were not delivered by the orators to Tarbell nor to the bank, but it was expressly agreed between Tarbell and the orators that they should not have any effect nor be delivered to any one to be used for any purpose whatever until the indemnifying bond of Pierce should be furnished the orators, but that in the mean time they should be held by one Rolfe, to whom they were then handed by the orators. It was, however, at the suggestion of Tarbell and Rolfe, agreed by the orators that, for the sake of expediting the transaction, the mortgage should be recorded in the town clerk's office in Tunbridge, but that after it was so recorded Rolfe should still retain possession of the bond and mortgage, and not deliver them to the bank, nor to any person to be used in any way for banking purposes till the indemnifying bond of Pierce was furnished. Rolfe received the bond and mortgage from the orators with this express agreement, and procured the latter to be recorded. The bond and mortgage were then, without the knowledge of the orators, assigned by the bank to the State treasurer, and were taken by Rolfe, accompanied by Tarbell, to the treasurer's office, where Rolfe delivered them to Tarbell, who, without the orator's knowledge, delivered them to the defendant, Bates, the then State treasurer, and received for them from Bates Virginia stocks and registered bills of the bank to the amount of the bond, which stocks and bills were thereafter used by and for the benefit of the bank.

It appeared that all the officers of the bank except Tarbell, as well as the State treasurer, were entirely unaware of any stipulation on the part of Tarbell to furnish the orators a bond of indemnity, or that the bond and mortgage were handed by the orators to Rolfe with any restriction of his power and authority to deliver them, but that all of the parties except Tarbell and Rolfe acted in perfect good faith in the transaction.

On Tarbell's return from the State treasurer's office he sent seventy dollars to Smith to pay him for the use of his farm for banking purposes for the first year, but Smith refused to accept it until the bond of indemnity should be furnished. The orators were not aware until February, 1857, that their bond and mortgage had been passed into the treasurer's hands. Shortly after they had learned this fact a conversation took place between Spencer Smith and Tarbell, wherein the latter said he thought he could obtain for the orators an indemnifying bond from Chester Baxter, which Smith urged him to do. At the same time Tar-

bell told Smith to take the seventy dollars which had been lying subject to his order at the union store in Tunbridge since the August previous, and said that if a satisfactory indemnifying bond was not furnished within a very short time the money should be regarded merely as a loan from Tarbell to Smith, and upon this understanding the latter consented to receive it.

In April, 1857, the orators notified the State treasurer that the bond and mortgage in question had been fraudulently obtained and used, and that they should resist the payment thereof. This was the first notice that the State treasurer received of any claim of this kind on the part of the orators.

The defendant, Carpenter, in July, 1857, was appointed receiver of the South Royalton Bank by the Court of Chancery for the purpose of collecting its assets, redeeming its bills, and discharging its remaining indebtedness. It appeared that Tarbell was insolvent.

The bill set forth substantially these facts, and prayed for an injunction restraining the South Royalton Bank, the State treasurer and Carpenter, from proceeding in any way to collect the orators' bond and mortgage, and also that they might be decreed to deliver the same up to the orators.

Barrett, Chancellor, upon hearing, made a decree in accordance with the prayer of the bill, from which the defendants appealed.

Wm. Hebard and *Lucius B. Peck*, for the orators.

H. Carpenter and *P. T. Washburn*, for the defendants.

Bennett, J. This is a case of very considerable importance, and we have endeavored to give it a careful consideration. We have no doubt, from the testimony, that the bond and mortgage in question in this case were delivered *conditionally* to Rolfe, to be delivered by him to the State treasurer, when the orator, Spencer Smith, should be indemnified from all loss and damage which should be occasioned to him by reason of the same, and not before. No precise form of words is necessary to make an instrument an *escrow*, and an *escrow* has been well defined to be the *conditional delivery* of an obligation or deed, which is to take effect upon the happening of some event consistent with the instrument, and not a condition of delivery repugnant to the contract and varying its terms. It is laid down in our elementary writers, that an *escrow* can never take effect as a deed till the performance of the condition, even though the grantee gets possession of it before such performance; and in *Hinman* v. *Booth*, 21 Wendell, 267, it was held that the condition must be *literally* fulfilled, and that where the condition was that the grantee was to give a bond for the support of a third person, and such bond had not been given, the deed could not take effect, although the support had been in fact furnished such third person during his life, and he had deceased. Until the condition is performed the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk. The delivery is a part of the execution of the instrument, and is essential to its vital-

ity; see 1 Shep. Touchstone, 59; 2 Hilliard on Real Property, 305, §§ 131 and 132.

It is not in fact seriously contested in this case, but that the bond and mortgage were delivered to Rolfe as *escrows*, and that they were delivered over to the State treasurer by Rolfe without authority, and *in fraud* of the rights of the orators, inasmuch as Pierce's bond of indemnity had never been procured, and the case is put upon the ground that the State treasurer, under the banking law of 1851, took the bond and mortgage in *good faith* for value paid, and that he has a good right to have them enforced, that the same may become assets of the bank in the hands of the receiver for the benefit of the bill holders of this insolvent institution. We are not disposed to question the fact that the bond and mortgage were received by the treasurer in *good faith* and for value, and that one of the two innocent parties must suffer, and the question now is, which it must be? In the case of an *escrow* the estate does not pass, but remains in the grantor until the condition has been performed and the deed delivered over, and if the deed be delivered over without a performance of the condition, it cannot be an operative delivery to pass the estate. In this case Rolfe was the special agent of the grantors to hold the bond and mortgage till the condition was performed, and no presumption can arise of his having a general agency, if that should be thought to be of any importance. The deed not having been delivered it was a nullity and void, or more properly speaking, *never existed*, and must be tainted with the *fraud* of Rolfe, which goes to the very existence of the instruments, into whosesoever hands they may come. It is not like the cases where the *fraud is collateral*, as where the instrument has become a perfect one, and it is appropriated fraudulently to a use different from the one for which it was created. It is then the important question in the case, whether from the facts disclosed there is any good ground to hold that the grantors cannot avail themselves of the want of a delivery of the bond and mortgage?

It is said on the part of the defence that the orators ought to be bound by the delivery of the bond and mortgage by Rolfe, although he has been guilty of a gross fraud and has transcended his authority, because the orators have enabled him to mislead an innocent party, and that the *maxim* of natural justice well applies to this case with its full force, "that he who, though without any intentional fraud, has put it in the power of another person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the loss, rather than the other party who has placed confidence in him."

Though this position may seem specious, yet we think, as applied to this case, it is not sound. The authority delegated to Rolfe was to do a single act, and his agency was of the *most special kind*, requiring him only to perform a single act, strictly ministerial in its character. Mr. Smith, in his treatise on Mercantile Law, a work of great accuracy, on page 59, 2d edition, after defining a general agent, proceeds to say, "his authority cannot be limited by any private order or direction not

known to the party dealing with him. But the rule," he says, "is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction, for it is," he adds, "the duty of the person dealing with such a one to ascertain the extent of his authority, and if he does not do it he must abide the consequences." So in Paley on Agency by Lloyd, 3d edition, 199, note, after stating the rule applicable to general agents, and the assumptions to be made that they have an unqualified authority to act in all matters within the scope of their agency, it is said, "in the case of a particular agent, that is, one employed specially in that single instance, no such assumption can be reasonably made, and it becomes the duty of the person dealing with him to ascertain by inquiry the nature and extent of his authority, and if it be departed from he must be content to abide the consequences."

This distinction, he says, will explain all the cases in the text. See also Smith's Mer. Law, 3d ed. 107, 108; *Wooden* v. *Burford*, 2 C. & M. 395; *Jordan* v. *Norton*, 4 M. & W. 155; *Sykes* v. *Giles*, 5 M. & W. 645.

Where one of two innocent persons must suffer from the *fraud* of a third person, the inquiry naturally arises, which gave the credit? Smith is not chargeable with holding out Rolfe as possessing larger powers than he in fact had; and the State treasurer, not having ascertained the true extent of his powers, though this may be without any personal fault in him, must, as between Smith and himself, be regarded as having trusted to Rolfe rather than Smith, or in other words, the State treasurer, or rather those in whose behalf he was acting, must sustain the loss occasioned by *the fraud* of Rolfe rather than Smith. If an agent in dealing for his principal, strictly within his authority, commits a fraud in the sale of property, the principal must answer for it, unless he chooses to repudiate the fraud and restore the dealer to his former situation. He cannot adopt the dealing and repudiate the fraud. The *maxim* in relation to which of two innocent persons shall suffer from the fraud of a third person, is not to be so extended as to make the principal responsible for the want of the general integrity of his agent, and for his acts attended with fraud which are not included within the power conferred upon him. Such an application of the maxim would break down well-settled principles, and would prevent the principal from defending upon the ground that it was the fraud of the agent, even in cases where the agent acted in a matter beyond the extent of his powers. The maxim was first applied by Lord Holt, in an action for a *deceit* in the sale of some silks by an agent who had authority to make the sale; 1 Salk. 289. In such a case the application of the maxim is well enough, but here Rolfe was a special agent to deliver the deed upon a special condition, and the fraud consisted in his doing an entire act which he had no authority to do. It might have been better, if the law had required that it should appear upon the face of a deed that it was delivered as an *escrow*, and if such had been the rule grantees might have been more secure against fraud, but as was well

said by Ch. J. Marshall, "the law is settled otherwise, and it is not to be disturbed by the court;" 4 Cranch, 222. The position that an agent with limited powers cannot bind his principal when he transcends his powers, and that the person dealing with him is bound to know the extent of his powers, is too well established to be questioned; 1 Peters, 290. The bond and mortgage then was a *nullity* in the hands of the treasurer *for the want of a delivery*, and he cannot escape this consequence by an application to the case of the maxim which is sometimes applied, as between two innocent parties. This is not like the case of *Pratt* v. *Holman et al.*, 16 Vt. 530. There the deed was delivered to the agent appointed by the grantee to procure it. In such a case the delivery to the agent was effective to pass the title, although it was delivered upon a condition which had not been performed; 1 Selden, 238; 8 Mass. 238. In legal effect it was a delivery to the grantee.

Besides, the court in *Pratt* v. *Holman* put the case upon the ground that the agent was satisfied with *the promise to pay the money*, and if not paid, an action might be had on the promise. This was clearly a case where the deed took effect from the time it was delivered to the agent.

The case at bar is one that does not fall within the *law merchant* as to negotiable paper. The general rule of the common law is that an assignee takes a chose in action, subject to all the equities that existed between the original parties. In the case of *The Mechanics' Bank* v. *N. Y. & N. H. R. R. Co.*, 3 Kernan, 599, the plaintiffs were *bona fide* holders of the certificates of stock for value advanced at the time, and Schuyler was, at the time the certificates were issued, president of the company, and also *transfer agent*, whose business it was, on the transfer of stock on the books in his charge, and the surrender of certificates, to issue new certificates of stock to the transferee, and the certificates in that case issued to Kyle were in the usual form, and were duly transferred by Kyle to the plaintiffs. Kyle and the transfer agent of the company were both parties to the *fraud*, and yet it was held that the railroad company could not be made liable to the bank on the ground that Schuyler was their transfer agent. The certificates not being commercial paper, the ordinary rule was applied. See also *Grant* v. *Norway*, 70 Com. Law, 665; *Coleman* v. *Riches*, 29 Eng. Law & Equity, 323; *The Schooner Freeman* v. *Buckingham et al.*, 18 Howard U. S. 182.

The case of *The Farmers' & Mechanics' Bank* v. *The Butchers' & Drovers' Bank*, 2 Smith (N. Y.) 125, where the *paying teller* had certified a bank cheque *to be good*, in violation of his duty, the drawer having no funds in bank, was decided purely upon the ground that a bank cheque was *negotiable paper*, and governed by the law merchant.

We think the orators are not precluded from urging in their defence a want of authority in Rolfe to deliver the bond and deed, by reason of their holding him out as having such authority.

The only pretence for this arises from the naked fact that the ora-

tors consented that the assignment might be made upon the papers, and the deed put on record, while Rolfe held them as *escrows*. This, it seems, was done simply to expedite the business. In *Maynard* v. *Maynard*, 10 Mass. 456, it was well held that the grantor's putting a deed upon record did not constitute a delivery of the deed to the grantee. No title could pass out of the grantors of course by the force of its being recorded, but still the question remains, What shall be the effect of puting such apparent title on record, so far as the rights of the treasurer are concerned, who acts as a trustee? Tarbell, who negotiated with the mortgagors for this mortgage to the bank, was at the time one of the directors in the bank, and was a party to the transaction, and privy to the conditions upon which the papers were put into Rolfe's hands, and the object of having the deed put on record while in the hands of Rolfe. Notice of these facts to Tarbell, a director, in the very transaction itself, was notice to the bank.

The mortgagors should not in this case be *estopped* from insisting upon a want of the delivery of the deed by reason of the record. To hold this would only be asserting in another form, that *fraud*, where the act is one of pretended agency, is no defence. It would subvert the settled doctrine that the assignee takes subject to all equities between the original parties. Besides, the putting the deed upon record was not by implication a representation of any other fact, and not designed to influence the treasurer to accept the deed without any valid delivery, but it was consented to to facilitate the completion of the whole business. No question can be had but what the bond and deed were a *nullity* in the hands of the bank, and both Tarbell and Rolfe were guilty of a gross fraud in passing them off to the treasurer. The bond and the mortgage then being, as between the orators and the bank, of no more force than so much blank paper, and utterly *void*, they are incapable of confirmation, so as to confer a title to the assignee of the bank. It is no doubt true that there is a radical distinction, as it respects the rights of a *bona fide* purchaser or assignee without notice, between a *void* and a *voidable* instrument. If, for instance, a voluntary and covinous deed of lands is made to a grantee, and he conveys to a *bona fide* purchaser without notice, the purchaser shall be preferred to the creditors of the fraudulent grantor. In such a case the deed is valid as between the parties, and *voidable* only by the creditors of the vendor. It may be conceded as a sound principle of law that in cases of *voidable deeds* and *obligations* the *bona fide* assignee or purchaser stands in a better situation than the participant in the fraud, but not so if the instrument was *void*. In the case of *Martin* v. *Miller*, 4 Term, 320, it was held that an unauthorized alteration in a bill of exchange, after acceptance, by which the time of payment was shortened, avoided the instrument, and that no action could afterwards be maintained on it, even by an innocent holder for value. The case of *Arch* v. *Dixon*, 5 Eng. Law & Equity, 512, seems by the court to be put upon the ground that the note never became a perfect instrument, as against the defend-

ant, inasmuch as there was no authority, express or implied, from him for a delivery of the note.

But let the principle be as it may in regard to commercial papers, no question can be made as to a *void deed*. The case of *Van Arnaige* v. *Miller*, 4 Wharton, 382, is ruled expressly on the distinction between a *void* and a *voidable* deed, and it was there held that a *bona fide* purchaser for a valuable consideration from the person holding a void deed stands in no better situation than such fraudulent holder. The distinction is fully recognized in *Price* v. *Yunkin*, 4 Watts, 85, and the case decided upon that distinction. So in *Arrison* v. *Harmstead*, 2 Barr, 191, 195, it was held that a deed having been rendered void by an alteration, a purchaser without notice and for valuable consideration was in no better situation than the original parties. The case in the 4 Wharton, as in the case at bar, was one where there had been no valid delivery of the deed. So in the case of *Pawling* v. *United States*, 4 Cranch, 219, there had been no delivery of the deed. It hardly need be remarked that if a deed wants delivery, it is *void ab initio*.

Where a *bona fide* purchaser for value holds under a vendee, who holds by a *voidable* deed, though he and the creditors of the vendor have equal equities, yet the purchaser has also the legal title and shall be preferred. In the case at bar, though the bill holders of the bank represented by the treasurer and the orators have equal equities, yet as the bond and deed are *void*, the legal title remains in the orators and they should be preferred under the common rule, that where the equities are equal, the one having the legal title prevails.

It becomes necessary to see whether in this case there was a subsequent recognition of the delivery of the bond and deed by the orators, or something done by them which enabled Rolfe and Tarbell to deceive the assignee, and should exclude the orators from relief. We think, from the evidence, there is no ground to find the fact that Smith subsequently ratified the delivery of the bond and mortgage. When he found the papers had been fraudulently delivered by Rolfe, he had a right to try to extricate himself from loss. If he had accepted some other security in the place of Pierce's bond, it might have operated as a recognition of the delivery, but his willingness to take other security should have no such operation; and as to the reception of the seventy dollars, which by the contract he was to have for the use of his farm, for putting it in for banking purposes, as it was called, he accepted it, not under the original agreement, but under a new agreement, that it should be treated as money lent unless Tarbell should subsequently indemnify him against the bond and mortgage. The omission of Smith to give earlier notice to the treasurer of his defence cannot be construed into a ratification of the delivery of the papers, and though, if the treasurer had had earlier notice, he might have been enabled to make all things right with the bank, yet that should not throw the loss upon Smith. Both the treasurer and Smith no doubt supposed the bank amply safe, and there was at that time nothing to cause alarm in the

minds of either, and no sufficient reason in law or fact is shown why Smith should have been required to give earlier notice to prevent a waiver of his defence to the bond and mortgage.

We think that the treasurer cannot claim to take this case out of the ordinary rule upon the ground that he has been misled as to the extent of the authority of Rolfe, by the act of Smith. The bond and mortgage were, it is true, put into the hands of Rolfe, and by him carried to the treasurer in company with Tarbell, and though Rolfe and Tarbell passed them to the treasurer professedly in behalf of the bank, yet this was in no way the act of Smith, and it does not appear that they exhibited any authority from the bank so to do, and no inquiries were made of Rolfe as to his powers, and not only Rolfe and Tarbell acted in fraud of the rights of Smith, but the bank also are chargeable with participating in the fraud, inasmuch as notice to Tarbell, a director in the bank, is to be regarded as notice to the bank, of the terms upon which Rolfe held the possession of the papers. It may be conceded, perhaps, that this is a hard case for the bill holders, but would it not be much harder for the orators if they are to be visited with the fraud of Tarbell, of the bank, and of Rolfe, through whose wrongful conduct claim is made? No doubt fraud may be committed on an innocent purchaser, but had we not better encounter that risk rather than attempt to give effect to a *void deed*, simply on the ground that the grantors should be estopped from contesting it, for the reason that they consented that it might be recorded, before it was delivered, for an honest and laudable purpose? In the ordinary case a deed purports upon its face to be an *absolute* deed, and purports to have been signed, sealed, acknowledged and delivered, yet the law is well settled that it may be shown by parol that it was delivered as an *escrow*, and if it has also been recorded, still it may be shown to be only an *escrow*, and the fact of its having been recorded is of itself no evidence that the person who held the instrument as *an escrow* in his hands after it was recorded, held it with enlarged powers, as to his *agency*, and the principles of law applicable to a case of *special* agency must apply and govern this case.

The decree of the Chancellor is affirmed, with additional costs.

MOORE *v.* HAZELTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1864.

[*Reported* 9 *Allen*, 102.]

BILL IN EQUITY, alleging that in October, 1847, one Chamberlain was appointed by the Probate Court guardian of the plaintiff, then under age, and accepted and gave bonds for the discharge of his trust; that he received in cash the sum of $6,000 belonging to the plaintiff, paid him the interest, but never any part of the principal, and continued to

act as guardian until the plaintiff became of age, and then owed him the sum of $6,000; that in June, 1861, Chamberlain, as such guardian, being then insolvent and unable to pay his debts and liabilities, knowing that the plaintiff was of age, and being desirous of paying him what was due him, and intending to set apart and apply a portion of his own general assets in part payment of what was due to the plaintiff and to be his property and to be held in trust as a part of the fund which Chamberlain had originally received, belonging to the plaintiff, by proper deeds of assignment duly executed, assigned, for the purpose aforesaid, to the plaintiff five recorded mortgages of real estate and the promissory notes secured thereby, for the sum in all of about $2,500. The assignments were referred to in the bill, and upon inspection appeared to have been "executed and delivered in presence of" an attesting witness by Chamberlain on the 1st of May, and acknowledged by him before a justice of the peace on the 3rd of June, 1861.

The bill also alleged that in January, 1863, Chamberlain applied for the benefit of the insolvent laws, and the defendant was chosen assignee, and Chamberlain's estate duly assigned to him; that Chamberlain, having retained possession of these mortgages, notes, and assignments, in March, 1863, caused the assignments to be recorded in the registry of deeds, for the purpose and with the intent aforesaid; that the plaintiff early in 1863, when and as soon as these facts came to his knowledge, assented to the assignments so made to him; and he submitted that the mortgages and assignments were his property; and alleged that Chamberlain afterwards took the mortgages and assignments from the registry, and held them with the notes in trust for the plaintiff, and never, after making the assignments, treated them as any part of his private assets, and did not deliver them as such to the defendant; but that the defendant afterwards took and now had possession of them, claiming to hold them as part of Chamberlain's general assets, and refused to deliver them to the plaintiff. The plaintiff submitted that he was entitled to have them applied in payment of the fiduciary claim against Chamberlain, and prayed for a decree that they belonged to him as a trust fund set apart by the guardian from his general assets, that they might be subjected to the payment of his claim, and for an account, and for general relief.

The defendant, admitting the facts alleged, demurred generally to the bill for want of equity.

D. E. Ware, for the defendant.

P. C. Bacon, for the plaintiff.

GRAY, J. The relation of a guardian to his ward is not that of an ordinary trustee to his *cestui que trust*; but the title to the property is in the ward; the trust of the guardian consists in the control and management of the ward while under age, and of the property until he discharges himself of his duty by accounting for it according to law. If he continues in the possession and management of the property after

the ward has come of age, without settling his accounts, it is in effect a continuance of the guardianship as to the property. *Mellish* v. *Mellish*, 1 Sim. & Stu. 138. *Morgan* v. *Morgan*, 1 Atk. 489. Among the duties undertaken by a guardian on assuming his trust, as set forth in the conditions of his bond, are, "at the expiration of his trust to settle his accounts in the Probate Court, or with the ward or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands or due from him on such settlement to the person or persons lawfully entitled thereto." Rev. Sts. *c.* 79, § 5. Gen. Sts. *c.* 109, § 16. If the guardian fails or neglects to account, the ward's only remedy against him, at law or equity, is upon this bond. *Brooks* v. *Brooks*, 11 Cush. 20, 21. *Conant* v. *Kendall*, 21 Pick. 36. And the settlement of an account out of court by the ward, on coming of age, does not prevent him from afterwards, within a reasonable time, citing the guardian to render an account before the judge of probate. *Wade* v. *Lobdell*, 4 Cush. 510. 2 Kent, Com. (6th ed.) 229. In the case before us, although the ward was of age at the time of the execution of the assignments to him, the relation of guardianship, so far as property was concerned, still continued, because the guardian had not been discharged from his trust by accounting according to law. And his power and duty to separate the ward's property from his own, or to make good any part of it which he had lost or wasted, was the same after the ward had come of age as it had been during his minority. See *Yerger* v. *Jones*, 16 How. 37.

The assignments executed by Chamberlain to the plaintiff do not stand upon the footing of voluntary assignments; for the previous receipt of the ward's money and the fiduciary relation between the parties were a sufficient consideration. It appears by the original assignments (which there is nothing to contradict) that they were executed and delivered in the presence of an attesting witness in the form required by law to pass such property. As the title to the ward's estate was in him and not in the guardian, the evidence of the trust in the securities in question would properly be in the form, which was actually adopted, of an assignment to the ward himself, rather than a declaration of the trust upon which the guardian should continue to hold it for the ward's benefit. Yet so long as the guardian had not settled his accounts, but continued in the relation of guardian so far as related to property, he would naturally keep these assignments, like other property of the ward, until he should account for them in the Probate Court. His retaining possession of the instruments of assignment was therefore in perfect accordance with the nature of his trust. When an instrument of conveyance is sealed and delivered, with an intention on the part of the grantor that it should operate immediately, and there is nothing to qualify the delivery but keeping the deed in the hands of the grantor, it is a valid and effectual deed, in law and equity; and execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer a delivery. *Shelton's Case*, Cro.

Eliz. 7. *Doe* v. *Knight*, 5 B. & C. 671; s. c. 8 D. & R. 348. *Hope* v. *Harman*, 16 Q. B. 751, *n.* *Jeffries* v. *Alexander*, 8 H. L. Cas. 649, 667. *Hall* v. *Palmer*, 3 Hare, 532. *Fletcher* v. *Fletcher*, 4 Hare, 79, 80. *Bunn* v. *Winthrop*, 1 Johns. Ch. 329. *Scrugham* v. *Wood*, 15 Wend. 545. Proof of the ward's assent to these assignments was therefore unnecessary to give them effect.

The assignments to the ward having been made for a valuable consideration, and completed more than a year before the institution of proceedings in insolvency, the assignor's insolvency at the time of making the assignments to the ward is immaterial, and the assignee under those proceedings has no title to these securities as against the ward.

Demurrer overruled.

COOK *v.* BROWN.

Supreme Judicial Court of New Hampshire. 1857.

[*Reported* 34 *N. H.* 469.]

Writ of Entry.[1]

Eastman, J. The question which was found for the plaintiff, and upon which the verdict was rendered, was the delivery of the deed by Mrs. Brown, the defendant's husband, to Richard F. Fifield. If this deed was not delivered, the demandant was entitled to recover; and the jury, under the rulings and instructions of the court, have found that it was not.

But were the instructions of the court correct in regard to the delivery of the deed? This is the important question of the case. The court instructed the jury that if the deed was in the hands of the depositary, to be delivered to the grantee, either before or after the death of the grantor, without the grantor's reserving a control over it, then there was a good delivery. But if the grantor reserved such a full control over the deed during her life, and to the last moment of her life, there was no delivery. If she always had the right to control the destination of the deed, there was not a delivery, but if she at any time relinquished her right in favor of the grantee, there was a delivery; that the question was, whether she always, until her death, continued to have the *right* to recall the deed, if she pleased, and not whether she did in fact recall it. The court were requested to instruct the jury, that if the deed was to remain in the hands of the depositary during the life of the grantor, subject, however, during that time to be revoked by the grantor, and if not revoked then to be recorded, the deed might be regarded as the deed of the grantor from the time of the delivery to the depositary, if it was not subsequently revoked.

[1] Only the opinion, and only that part of the opinion which relates to the question of delivery, is given.

These instructions the court declined to give, and gave those which we have stated. The point of difference between the two was this: The court held that in order to make the delivery good, it was essential that the grantor should part with her dominion over the deed. That the time when the grantee was to receive it was not material, whether at or before the decease of the grantor, but that the delivery to the depositary must be without the power of recall in the grantor; while the defendant contended that if the deed was in fact delivered in pursuance of the directions of the grantor, it made no difference that the grantor had reserved the right of recalling the deed at any time.

In *Shed* v. *Shed et al.*, 3 N. H. 432, where A. made an instrument purporting to convey to his two sons, B. and C., certain tracts of land, with a reservation of the use of the land to himself during his life, and delivered the instrument to D. to be delivered to B. and C. as his deed, after his decease, in case he should not otherwise direct: and A. died without giving any further directions — it was held, that the instrument was to be considered as the deed of A. from the first delivery, and that it might operate as a covenant by A. to stand seised of the land to his own use during life, remainder to B. and C. in fee. Richardson, C. J., in delivering the opinion, says: "In the case now before us, the writing was intended to effect a mere voluntary disposition of the land; and why the grantor might not reserve to himself a right to revoke the writing if he saw fit, does not readily occur to our minds. If he might legally deliver the writing absolutely, to take effect on his decease, we do not see why he might not deliver it conditionally, as an escrow, to take effect upon his decease, in case he did not change his mind and revoke it. Being the absolute owner of the estate, it seems to us that he had an incontestable right to deliver the instrument, absolutely or conditionally, according to his will and pleasure."

The decision in that case would appear to be in point for the defendant, but we do not find any other case in our own Reports, and but one or two in others, which go to that extent. On the other hand, there are many authorities which seem to us to establish a somewhat different rule.

In *Parker* v. *Dustin*, 2 Foster, 424, a grantor executed a deed and delivered it to a third person, with instructions to deliver it to the grantee upon the grantor's death. He afterwards told the grantee that he had given him the land, and directed him to take possession of it, which the grantee did, and afterwards remained in possession; and it was held, that it was a question of fact for the jury, upon the evidence, whether the grantor deposited the deed with the third person, to be delivered at his decease, without reserving any control over it during his life; and that the deed should be considered as delivered or not, as the finding of the jury might be on the question of his intention. That is to say, if he intended to reserve a control over the deed, it was no delivery; but if he did not so intend, it was a delivery.

In *Doe* v. *Knight*, 5 Barn. & Cres. 671, the court told the jury that the question was for them to decide whether the delivery to the depositary was, under all the circumstances of the case, a departing with the possession of the deed and of the power and control over it for the benefit of the grantee, and to be delivered to him, either in the lifetime of the grantor or after his death; or whether it was delivered to the depositary, subject to the future control and disposition of the grantor. If for the latter purpose, they should find for the defendant. The point in that case was distinctly put; the defendant was seeking to defeat the deed, and the court held the validity of the deed to depend upon the question, whether the delivery to the depositary was or not subject to the future control of the grantor.

In *Commercial Bank* v. *Reckless*, 1 Halstead's Ch. 430, it was held that, to constitute the delivery of a deed, the grantor must part, not only with the possession but with the control of it, and deprive himself of the right to recall it.

In *Baldwin* v. *Maultsby*, 5 Iredell, 505, it was held that where there has been no delivery in the lifetime of the grantor, a delivery after his death, though at his request, is void.

In *Maynard* v. *Maynard*, 10 Mass. 456, the court, in speaking of the deed which was in controversy in that case, and of the grantor, say: "He probably chose to consider it as revocable at all times by himself, in case of any important change in his family or estate. Whatever may have been his views, however, he retained an authority over it." It is the retaining of the authority over it that shows the delivery to be incomplete. *Jackson* v. *Phipps*, 12 Johns. 421; *Jackson* v. *Dunlap*, 1 Johns. Cas. 114; 1 Devereux Eq. 14; C. W. Dudley's Eq. 14; *Hooper* v. *Ramsbottom*, 6 Taunton, 12; *Habergham* v. *Vincent*, 2 Ves. Jr. 231.

All of these authorities differ essentially from that of *Shed* v. *Shed*, and it appears to us that they are founded upon sounder principles.

The delivery of a deed is either absolute or conditional; absolute when it is to the grantee himself or to some person for him; when the grantor parts with all control over it, and has no power to revoke or recall it; conditional, when the delivery is to a third person, to be kept by him until some conditions are to be performed by the grantee. When the delivery is absolute, the estate passes at once to the grantee; but when conditional, the estate remains in the grantor until the condition is performed and the deed delivered over to the grantee. Strictly speaking, a conditional deed is not a deed, but an *escrow*, a mere writing, the effect of which is to depend upon the performance of the conditions by the grantee. If they are performed it becomes a deed, otherwise it is a mere nullity. Co. Lit. 36; Cruise, title 32, ch. 2; 2 Black. Com. 307; 4 Kent's Com. 454; *Jackson* v. *Catlin*, 2 Johns. 248; *Carr* v. *Hoxie*, 5 Mason, 60; Shep. Touch. 57, 58.

By fiction of law an *escrow* is sometimes made to take effect from the first delivery. The relation back to the first delivery, however,

is allowed only in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery. 4 Kent's Com. 454; Perkins on Conveyancing, § 138; 3 Coke, 30; 3 Black. Com. 43; *Frost* v. *Beekman*, 1 Johns. Ch. 297; 5 Co. 84 b.

A deed which is put into the hands of a third person, to be delivered to the grantee on the happening of some future event, but where no conditions are to be performed, is not an *escrow* or conditional deed. Its delivery is not dependent upon any condition to be performed, but it is a valid deed from the beginning, and the holder is but a trustee or agent for the grantee. In such a case the grantor has parted with all control over the deed. Perkins, §§ 143, 144; 6 Mod. 217; *Foster* v. *Mansfield*, 3 Met. 412; 4 Kent's Com. 455; *Stillwell* v. *Hubbard*, 20 Wendell, 44.

But so long as a deed is within the control and subject to the authority of the grantor, there is no delivery. And whether in the hands of a third person or in the desk of the grantor, is immaterial, since in either case he can destroy it at his pleasure. To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing; it is merely ambulatory, and gives no title. It is nothing more than a will defectively executed, and is void under the statute. Rev. Stat. chap. 156, § 6; *Habergham* v. *Vincent*, 2 Ves. Jr. 231; Powell on Dev. 13; 1 Rob. on Wills, 59; 4 Bro. Ch. 353; Rob. on Frauds, 337.

The case of *Habergham* v. *Vincent* was that of a deed, to take effect by way of appointment, after the death of the party. The subject was elaborately discussed and fully considered by the Chancellor and Justices Wilson and Buller. In the course of the discussion, Buller says: "A deed must take place upon its execution or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing that interest, to be conveyed at the execution, but a will is quite the reverse." And, after examining the various authorities upon the point, he adds: "These cases have established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity, and in one of them there were express words of immediate grant, and a consideration to support it as a grant: but as upon the whole the intention was that it should have a future operation after death, it was considered as a will." And the court all held, that the instrument then under consideration, though called a deed, though in form a deed, was in its nature testamentary, and being attested by only two witnesses, could not pass the freehold estate contrary to the provisions of the Statute.

Again, delivery of a deed is as essential to pass an estate as the signing, and so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the

deed. A deed may be signed by a third person by virtue of a power-of-attorney, duly executed, and so may it be delivered to a third person, to be delivered to the grantee. But the authority in such cases must be executed during the life of the grantor, otherwise it "availeth nothing," for no man can create an authority which shall survive him. After his decease the right "is forthwith in the heir." Lit. § 66; Willes, 105; Co. Lit. 52 b. There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. The depositary must have had such a dominion over the deed during the lifetime of the grantor as the latter could not interfere with, in order to have any control over it after his decease.

We think the instructions of the court below were correct: and that if the grantor, until her death, reserved the right to recall the deed from the hands of the depositary, there was no delivery.

The law of the case is not changed by treating this instrument as a deed of bargain and sale, or by way of covenant to stand seised for uses, as contended by the defendant's counsel. The Statute of Uses, 27 Henry VIII., has been adopted in this State, and a freehold estate *in futuro* may be thus conveyed. *French* v. *French*, 3 N. H. 234; *Bell* v. *Scammon*, 15 N. H. 381. This instrument may perhaps be regarded either as a deed of bargain and sale, or as a covenant to stand seised for uses. A bargain and sale requires a pecuniary consideration. 4 Cruise, 110; *Jackson* v. *Fiske*, 10 Johns. 456; and a conveyance to stand seised for uses requires the consideration of blood or marriage. 4 Cruise, 120; 4 Kent's Com. 493; *Rex* v. *Scammonden*, 3 Term, 474; *Underwood* v. *Campbell*, 14 N. H. 393. This instrument had expressed in it a small pecuniary consideration, and the evidence would seem also to show a sufficient relationship upon which to found a deed to stand seised for uses. But delivery is as essential to the valid operation of an instrument of this kind as to one conveying the estate immediately; and the jury having found that this deed was never delivered, a verdict for the plaintiff followed as a necessary consequence.

If the owner of land desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed; or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee. But if he wishes to retain the power of changing the disposition of the property at his pleasure, that can only be properly effected by will. So long as he retains the instrument, whether in the form of a deed or will, in his power, the property is his.

The motion in arrest of judgment cannot prevail. The count was sufficient after verdict.

The verdict having been returned for the plaintiff, and the rulings and instructions to which the defendant excepted having been sustained, it becomes unnecessary to consider the exceptions which were taken by the plaintiff, and there must be

Judgment on the verdict.[1]

Marston, with whom was *Christie*, for the defendant.

Morrison, *Fitch*, and *Stanley*, with whom was *Wells*, for the plaintiff.

WELCH *v.* SACKETT.

Supreme Court of Wisconsin. 1860.

[*Reported* 12 *Wis.* 243.]

Dixon, C. J.[2] The question which was considered by far the most important, and upon which the counsel bestowed the most attention, citing nearly all the English and American authorities, calls for the determination, in a case where a mortgage of personal property from a debtor to a creditor, is executed in the absence and without the knowledge of the latter, and delivered to a stranger for his use, of the time at which the title to the property mortgaged vests in the mortgagee, as between him and another creditor of the mortgagor who acquired an interest in it by attachment between the time of the delivery to the stranger and the time when the mortgagee actually received notice of and accepted it. Whilst it must be admitted that there is some conflict in the adjudications upon this subject, still both natural reason and the weight of authority tend to the same conclusion, which is, that the title in such case only vests from the time there is an acceptance in fact on the part of the mortgagee. On principle I think it may be laid down as an indubitable proposition in such case, that the title does not vest in fact, until the mortgagee has actually assented to the conveyance; and consequently, that until such assent it remains in the mortgagor. While all the courts acknowledge the correctness of principles which lead unerringly to this result, and clearly and positively exclude any other, it is somewhat strange that any should have been found to adopt a conclusion directly opposed to it. All agree that it is necessary to the validity of every deed or conveyance, that there be a grantee who is not only willing, but who does in fact accept it. It is a contract, a parting with property on the part of the grantor, and an acceptance of it by the grantee. Like every other contract, there must be a meeting of the minds of the contracting parties, the one to sell and convey, and

[1] See *accord*, *Baker* v. *Haskell*, 47 N. H. 479; *Parkerson* v. *Baker*, 30 Wis. 644; *Toft* v. *Toft*, 59 Mich. 185.

[2] The statement of the case and part of the opinion are omitted.

the other to purchase and receive, before the agreement is consummated. If there be anything in legal principles, or in common sense, it is an unpardonable absurdity to say, that a contract can be completed in the absence and utter ignorance of one of the contracting parties; that he can or does, under such circumstances, assent to, or agree to become bound by it. The idea that a contract could be thus made, and that title to property could pass into a party without his knowledge or consent, and out of him without any motion or act of his signifying his willingness, but merely by his refusal to receive it at all, had its origin at a period in the history of the common law, when the legal mind, instead of being governed in its conclusions by a steady application of the clear and rational principles of the law to plain matter of fact, and by arguments to be drawn therefrom, was too frequently influenced by a mysterious and fanciful logic, that depended for its support upon artfully devised fictions and falsehoods, which for the most part were as repugnant to reason as they were unnecessary to the proper administration of justice. The discovery that such things could be done, is, I believe, attributable to the inventive skill of Justice Ventris, as exhibited in the case of *Thompson* v. *Leach*, 2 Vent. 198, decided about the year 1690; at least several courts and judges since that time, with many complaints, have agreed in giving him the credit of having proved something on this subject which none of them could understand. The substance of his proposition is, that a deed of lands made to a party, without his knowledge or consent, and placed in the hands of a third person for his use, is a medium for the transmission of the title to the grantee, and takes effect so as to vest it in him, the instant the deed is parted with by the grantor, and if the grantee, upon receiving knowledge of it, rejects it, such rejection has the effect of revesting the title in the grantor by a species of remitter. Inasmuch as this is the only attempt at sustaining it by argument to be found in the books, the more recent cases having, without discussion, gone off almost entirely on the strength of the *authorities*, I propose to examine some of the positions assumed by him, upon which his argument mainly depends, and from which, I think, its fallacy and the incorrectness of his conclusions will be clearly made to appear. He admits, what is universally conceded to be an indispensable element of every grant, namely, that it should be accepted by the grantee, and says, "that an assent is not only a circumstance, but it is essential to all conveyances; for they are contracts, *actus contra actum*, which necessarily suppose the assent of all parties;" but avoids the difficulty into which the admission of this well settled principle brings him, by saying, "that because there is a strong intendment of law, that for a man to take an estate is for his benefit, and no man can be supposed to be unwilling to that which is for his advantage," therefore the law will presume that the grantee has accepted a conveyance before a knowledge of its execution and delivery has come to him. Upon the foundation of this hypothesis, misnamed by him *a presumption of law*,

the falsity and unreasonableness of which are so self-evident that reasoning can hardly make them plainer, he proceeds to the erection of his superstructure. Assent or acceptance on the part of the grantee or other party to a deed or other instrument, by means of which the title to property, whether real or personal, is to be transferred to him, or by which he is in any other manner to become bound, is a *fact*, the truth of which is to be established by competent evidence, before such deed or other instrument can be adjudged to have a legal existence. Like every other fact, it may be established by direct evidence, or its existence may be inferred or presumed from other facts already in proof. But I deny that the existence of one fact is to be inferred or presumed from the existence of others, when the connection between the former and the latter is such that according to the course of nature it plainly appears that the former cannot exist. In other words, I deny that the existence of any fact may be shown by proving others which conclusively show its non-existence, or that the legitimate mode of establishing the truth of a matter is by indubitably proving its falsehood. Justice does not require, nor does the law tolerate such an absurdity. The learned justice says, that where a deed is executed by the grantor and delivered to a stranger for the use of the grantee, without the previous advice, direction or authority of the grantee, and without his knowledge, the law will presume that the grantee assents to it, the moment it is delivered to the stranger. *Assent* is an act of the mind, — that intelligent power in man by which he conceives, reasons and judges, and of which it is a primary, invariable and most familiar law that it cannot act with reference to external objects, until, through the medium of the senses, it is impressed with or *knows* their existence. Hence, without such impression or knowledge, there can be no assent, no *actus contra actum*; and to presume it in opposition to the facts, is to presume that which is impossible; which the law, the rules and precepts of which are in conformity with the unchanging truths of nature, will never do.

"A presumption," says Mr. Starkie, "may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, it is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature that as soon as the existence of the one is established, admitted or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject." Presumptions thus defined, he says, are either *legal and artificial* or natural, and may be divided into three classes. 1st. Legal presumptions made by the law itself, or presumptions of *mere law*. 2d. *Legal* presumptions made by a jury, or presumptions of *law and fact*. 3d. Mere natural presumptions, or presumptions of *mere fact*. The definition which he so clearly and accurately gives, although applied by him to all presumptions, is perhaps more strictly applicable to the latter

class. The assent to a deed or other instrument by the grantee or other party, being a matter of *mere fact*, it is obvious that to the latter class also would belong a presumption in relation to such assent, in a case where such presumption could properly be indulged. But, whether the presumption be assigned to the one or the other of these classes, the position of the learned justice is equally untenable; for in no instance, not even the most artificial and arbitrary, does the law indulge in presumptions which are directly contradicted by the facts on which they are predicated. The known facts, though often insufficient of their own natural force and efficacy, to generate in the mind a conviction or belief of those which are inferred, are always, to say the least, not inconsistent with or opposed to them. If for example we take the case instanced by Mr. Starkie, of the presumption of the satisfaction of a bond after the lapse of twenty years, without payment of interest or other acknowledgment of its existence, while if a single day less than the twenty years has elapsed, such presumption does not arise, we find it to be extremely arbitrary and technical. No natural reason can be given why the lapse of the last day should operate to produce in our minds a conviction or belief of payment, while the lapse of all the days and years preceding it does not so operate. Such is not its effect. But as from common experience of the affairs of men, there arises in the mind, after the lapse of many years without payment of interest or other acknowledgment, a strong probability that a debt has been satisfied, and as the law loves certainty and industriously avoids doubts, it has from these motives *arbitrarily* fixed a period of time at the expiration of which this probability shall ripen into and take effect as a presumption of law, and at which the rights and position of the parties in reference to such debt, flowing from the *mere lapse of time*, unaccompanied by other circumstances, shall become determinate and certain. This presumption, which is in so many respects *artificial*, is in no respect inconsistent with the fact from which it is said to arise. On the contrary, though not conclusively sustained, it is strongly corroborated by the fact; since experience teaches that it is very improbable that the holder of the bond would, unless it were satisfied, permit such a space of time to elapse without receiving the interest or obtaining from the maker some other evidence of its non-payment. The same is true of that most purely artificial presumption, that a bond or other specialty was executed upon a good consideration, which is so peremptory and absolute in its nature that it cannot be rebutted by evidence; whilst the consideration of another instrument, executed and delivered under precisely the same circumstances, and in the same words, but not under seal, may be freely inquired into and impeached; yet there the conclusion that it was made upon a good consideration is entirely consistent with the facts from which it is drawn; for there is much reason for supposing that without a good consideration, it would not have been sealed and delivered. Without multiplying illustrations, I think it will be found that in no instance (unless the present case is to

form an exception) does the law infer the existence of facts in clear and direct opposition to those upon which the inference rests. It does not do so here. Reason rebels against it, and neither justice nor equity demands it. The only result of dropping the absurdity will be that, as in the present case, in a contest between two equally meritorious parties, the title to the property of which a conveyance was sought to be made, will be adjudged to be in him whom reason designates as the true owner.

The mistake of the learned justice consisted in his carrying the presumption of law so far as to say that it presumes that a person has consented to that of which he knows nothing, which is an impossibility: instead of saying, what was more truly said by the more logical and cautious courts and judges of his time, and by Lord Ellenborough, in *Stirling* v. *Vaughn*, 11 East, 623, namely, that, if nothing appears to the contrary, the law presumes that he *will* accept that which is for his benefit, when he is informed of it, which assent, in the absence of intervening rights or equities, will have relation back to the time of delivery for his use, and make his title good as from that date. After a brief argument of this sort, he proceeds to say, "that very odd consequences and inconveniences would follow, if surrenders should be ineffectual till an express consent of the surrenderee," and that most disastrous effects upon estates and conveyancing in England would ensue, unless her courts adopted and upheld his absurdity. It is said that one error surely gives rise to another and a greater. This saying was never more aptly and forcibly illustrated, than by the fantastic feats which the learned justice makes the common law, the sober common sense of ages, perform by way of getting the title back again into the grantor in case the grantee refuses to accept the conveyance. He says that after, by this kind of one-sided contract, it has got into him without his knowledge, it remains with him without his consent until he absolutely rejects and spurns the offer, and that then, by some magical power of the law, such rejection, without deed or other writing, becomes an instrument of conveyance, by which the legal title to land is conveyed from one who has it to one who has it not, against the express wishes of the latter and in despite of his own deed, the highest and most solemn act known to the law, by which he could rid himself of it. It is not surprising that the learned and logical Chief Justice Gibson, in *Read* v. *Robinson*, 6 Watts & Sergeant, 329, while commenting upon what he calls "the masterly argument of Justice Ventris, in *Thompson* v. *Leach*," says, that "the difficulty is to comprehend how the remitter can take effect without displacing intermediate interests springing from the rejected deed:" and then, as if in despair of ever comprehending it, he dismisses the subject from his mind by saying, "but the authorities conclusively prove that it may." All agree that neither the grantor nor the stranger who consents to receive and hold the deed, can, by their acts, bind the grantee, and that the latter may, on receiving notice of it, repudiate it altogether. If the title vests in

the grantee at once, it must, of course, vest according to the terms of the conveyance, and in the case of an absolute conveyance, he would have an absolute title. If, after delivery to the stranger, and before notice to the grantee, a creditor of the latter should fasten upon the property by execution or attachment, no reason can be given why he could not hold it. If it is the property of the grantee, it follows, as of course, that the creditor would have this right, and that he would at once acquire a lien to the extent of his demand. Suppose, after this is done, that the grantee, on receiving notice, refuses to accept the conveyance, what becomes of the property? Does the refusal unbind and set the property free from the seizure of the creditors, and remit the title at once back to the grantor? Or does the intendment of Justice Ventris step in, in behalf of the creditor as well, and say, because the grant is presumed beneficial to the grantee, and he might, at some future period accept it, that therefore he shall be deemed to have accepted it before the seizure, and at a time when he was utterly ignorant of it, and thus enable the creditor to withhold the property from the grantor, by which means it would happen that although it was neither bought nor sold, the grantor would, without consideration, lose it, and the grantee enjoy the full benefit of it on the same terms? Knowing of no rational or satisfactory answers which can be given to these and various similar questions which will readily suggest themselves to the reader, I leave them to be replied to by those who maintain that the title to property, real or personal, may, without words written or spoken, or other act of transfer, be thus mysteriously passed and repassed between parties by contract. I deny that it may be. It seems to me very plain, that it does not pass in fact until the grantee has actually consented to receive it; and, as of course, that it remains with the grantor, who is unable, without such consent, to vest it in the grantee. No other conclusion is consistent with the doctrine that a grant is a contract, and that the assent of the grantee is necessary to give it validity. The justice assumed the question in controversy by saying that the execution and delivery of the deed to the stranger passed the title out of the grantor, and then he was under the necessity of resorting to these further absurdities in order to account for it: for he says, "that it is not a slight matter, but what the law much considers, and is very careful to have the freehold fixed," and not "under such uncertainty, as a stranger that demands right should not know where to fix his action." If he had considered that the operation of the deed was suspended, or that it did not take effect until the grantee had assented, he would have been saved the trouble of drawing so largely on his imagination to show where the title was, and how it was thereafter to be controlled. It is a matter of no small moment, and of just pride to the bench of England, that Justice Ventris, at the time he wrote this wonderful argument, *dissented*, and that the other members of the Court of Common Pleas, viz.: Pollexfen, chief justice, and Powell and Rokeby, associates, were of opinion in the case, "that

there was no surrender till such time as the surrenderee had notice of the deed of surrender and agreed to it," and that it was so adjudged by that court; and that the case was afterwards taken by writ of error to the King's Bench, of which Lord Holt was at the time chief justice, and the judgment of the Common Pleas "was there affirmed by the unanimous consent of the whole court." It was afterwards brought by error into the House of Lords, where, as it is said, upon the reasons contained in Justice Ventris' argument, the judgment pronounced in both superior courts was reversed. Thus we have on the one side the legal learning, and almost the unanimous opinion of the courts, and on the other the judgment of reversal of the House of Lords, the great majority of whom knew very little, and cared less, about the correct settlement of legal principles.

The argument is of a piece with that kind of reasoning once employed to prove that titles to estates were "in abeyance," "in *nubibus*," and "in *gremio legis*," the folly of which is so thoroughly exposed and exploded by the severe and searching logic of Mr. Fearne, in his admirable treatise on Remainders. See pages 360 to 364, inclusive. It was held, in case of a lease to one person for life, remainder to the right heirs of another still living, that no estate remained in the grantor; and because there was no heir, for the reason that no one can be heir during the life of his ancestor, but only after his death, and because the tenant took only a life estate, the remainder was said to be in abeyance, in the clouds, or in the bosom of the law. These opinions were founded upon the very same assumption as that of Justice Ventris, namely; that the remainder passed out of the donor at the time of livery, and consequently that no estate remained in him thereafter; and because the title must always be somewhere, the advocates of the doctrine sent it to the clouds; "though," says Mr. Fearne, "by some sort of compromise between common sense and the supposition of an estate passing out of a man, when there is no person *in rerum natura*, no object beside hard and hardly intelligible words, for the reception of it at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate before the contingent remainder can take place, entitles the grantor, or his heirs, to enter and reassume the estate."

The questions are so closely allied, and the substrata of the two follies are so exactly alike, that Mr. Fearne's reasoning is fully in point. And it is certainly refreshing, after a perplexing and vain effort to understand that which never was and never will be intelligible, to take up an author, who, like Mr. Fearne, treats the subject upon the principles of common sense. He intimates a conviction, that instead of the title to estates being in the clouds, there is a much stronger probability of *caput inter nubila condit*, of the head of the inventor of the fiction having been buried or hidden in them. He says: "I cannot but think it a more arduous undertaking, to account for the operation of a feoffment or conveyance, in annihilating an estate of inheritance, or trans-

ferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles as well of common law as of common sense, a suspension of the complete, absolute operation of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of such inheritance comes into existence." The same is true of the delivery of a deed to a third person for the use of the grantee, without his knowledge or previous direction. It is far more compatible with common law and common sense, to say that its operation is suspended until the happening of the event indispensable in the law to its validity, namely, an acceptance by the grantee, than to make the law perform the wonderful exploits of vesting and recalling the title contrary to its best settled and soundest principles. I am of opinion therefore, that the defendants in error took no interest in the goods in question by virtue of their mortgages, until after the plaintiff in error had seized them upon process of attachment, and consequently, that they cannot maintain their action.

Much was said in this case, about the manner in which the mortgages were delivered. There can be no doubt that so far as the mortgagor was concerned, the delivery was good. They were placed by him in the hands of a stranger, to be by him delivered to the mortgagees, and thus passed beyond his reach and control, unless the mortgagees, within a reasonable time after notice, should refuse their assent. This made the delivery, as to the mortgagor, valid and binding, which is all I understand the author of the Touchstone to mean, when he says that a deed "may be delivered to any stranger for and in behalf and to the use of him to whom it is made." But a delivery by the donor to a third person, for the use of the donee, and an acceptance by the latter, are two very different things. By the former, the donor signifies his willingness to part with the property, whilst by the latter the donee makes known his assent to receiving it, and both must concur before the title is changed or affected. It was formerly, and may perhaps by some be still supposed, that there can be no delivery without at the same time an acceptance; that they are correlative, inseparable parts of the same transaction, and must both occur at the same instant of time: and hence, in part, the fiction of relation, by which in case of a delivery by the grantor to a stranger, the subsequent acceptance by the grantee was carried back in legal contemplation to the time when the grantor gave the deed to the stranger, in order to save the logic of the law and to preserve "the eternal fitness of things." It seems to me that every case in which it has been adjudged that there may be a delivery to a stranger, and that a subsequent ratification by the grantee will make the instrument effectual for the purposes intended, falsifies this notion and proves that in every such case there may be, what there is in fact, a delivery by the grantor at one time to a third party, and an acceptance by the grantee from such third party at a subsequent and different time. Such is the common sense of the transaction: and it is better

and more rationally disposed of without than with the aid of the fiction. But if the fiction must be employed, then the maxim, *in fictione legis semper subsistit equitas*, applies, and it will not be allowed to operate when it infringes or violates the rights of strangers. It is only resorted to in furtherance of justice and to prevent injury. In this case the plaintiff in error is a stranger to the mortgagees. He represents the rights and interests of the creditors of the mortgagor, who in good faith sued out and levied their attachments upon the goods, thereby lawfully acquiring a lien upon them; and it cannot be said to be in furtherance of justice, to postpone their demands thus legally secured, to those of the mortgage creditors, which are in no sense more equitable or just. The struggle is between innocent persons, to prevent loss, and the fiction ought not to be resorted to for the purpose of helping one as against the other. The transaction must be left to stand upon its simple and naked truth.

It is unnecessary for me particularly to refer to the cases cited by counsel. Those cited for the plaintiff in error, in their principles *substantially* sustain the views which I have taken. Many of those cited by the counsel for the defendants in error, are not directly applicable, whilst some of them clearly and positively uphold the opposite doctrine. Of this latter character, besides the English, are *Buffum* v. *Green*, 5 N. H. 71; *Wilt* v. *Franklin*, 1 Binney, 502; and *Merrills* v. *Swift*, 18 Conn. 257. In the first it does not clearly appear whether notice of the execution of the deed or the service of the process of attachment took place first. Both happened on the same day, but the court seem to adopt the theory that the title vested before notice to the grantee, and therefore the time of the service of the writ being immaterial, is not particularly noted. The principle upon which the doctrine rests is not discussed at all. The same is true of the case in 18 Conn. In both it is taken for granted that such is the effect of a delivery to a stranger. In *Wilt* v. *Franklin* there was a dissenting opinion of Justice Brackenridge, in which the fallacy of the reasoning of his two associates is so calmly and clearly brought out that it would be folly for me to do more than refer the reader to it. The case of *Doe ex dem. Garmons* v. *Knight*, 5 B. & C. 671, was determined upon the binding authority of previous adjudications. The question having hitherto remained undecided in this State, no such obstacle to its correct determination exists.

In the case of *Cooper* v. *Jackson*, 4 Wis. 537, it was expressly ruled, that "it is essential to the legal operation of a deed, that the grantee named therein assents to receive it, and there can be no delivery without such acceptance, but such acceptance need not be in person; it is sufficient if authorized or approved by the grantee." In that case the title of the grantee was held to be good as against the judgment creditor of the grantor, upon the express ground that there was a previous understanding between the grantor and grantee that the deed should be executed by the grantor and delivered by him to the register of deeds, to be recorded. This the court says constituted the register the agent

of the grantee for the purpose of receiving it. Upon this subject the following language is used: "The case at bar falls fully within the principle of *Hodge* v. *Drew*" (12 Pick. 141, previously noticed and commented upon in the opinion). "Here the grantee saw the deed after it was drawn, and the parties came to the understanding that the deed should be executed and left with the register to be recorded. There was an absolute divesting by the grantor of his estate in the land, and the deed was delivered to the register, who, *pro hac vice*, may be considered the agent of the grantee to receive it. *It is readily distinguishable from the cases where the grantor executes the deed without the knowledge of the grantee.*" In the case of *McCourt* v. *Myers*, 8 Wis. 236, there was no attempt by the mortgagor to deliver the chattel mortgage to the city clerk, or any third person, for the use and benefit of the mortgagees, and consequently no question upon the effect of such delivery arose. The only point adjudicated was, that the mere act of the mortgagor in causing the mortgage to be filed in the office of the clerk, was not such a delivery as would operate to give the mortgagees any title or interest in the goods specified in the mortgage.

The judgment of the Circuit Court is reversed, and a new trial awarded.[1]

Smith, *Keyes*, and *Gay*, for plaintiff in error.
Collins, *Atwood*, and *Haskell*, for defendants in error.

DERRY BANK *v.* WEBSTER.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1862.

[*Reported* 44 *N. H.* 264.]

THIS is a bill in equity, and the bill, answers and proofs sufficiently appear in the opinion of the court.

H. F. French, for the plaintiff.

James W. Emery, for the defendants.

BELLOWS, J.[2] This is a bill in equity by the Derry Bank against John G. Webster and Nathaniel F. Emerson. The plaintiff claims title to certain lands in Chester, formerly the property of said Emerson, by virtue of the levy of executions against him, one in favor of the Carroll County Bank, and the other in favor of one Barnes: the bill alleging a lien upon said lands, by attachment made December 17, 1857, and a levy in due time to preserve it; and a transfer of the title so acquired to the plaintiff.

[1] See *accord.*, *Halick* v. *Sewell*, 9 Ill. 159; *Doty* v. *Griffith*, 15 Iowa, 104; *Woodbury* v. *Fisher*, 20 Ind. 387; *Parmelee* v. *Simpson*, 5 Wall. 81; *Chamberlain* v. *Jackson*, 10 Bush, 424; but cf. *Rivard* v. *Walker*, 33 Ill. 418.

[2] Only that part of the opinion is given which relates to the question of delivery.

The bill states that Webster claims title to the same land by deed from the said Emerson, dated November 16, 1857, but that the deed was not in fact delivered until after the attachment, and that the price was not paid until after the attachment and notice of it; and, also, that the conveyance, whenever made, was fraudulent and void as to Emerson's creditors; and the plaintiff prays that the aforesaid deed of November 16, 1857, be decreed to be void. . . .

This brings us to a consideration of the title of Webster as derived from the deed of November 16, 1857, and the first question is, Was the deed delivered before the attachment? On this point the bill charges that the deed, although dated November 16, 1857, and recorded December 17, 1857, was not in fact delivered to Webster, or any person for him, until long after it was recorded, and after the attachment. The answer of Webster states a bargain made November 16, 1857, for the farm, at $6,300; $1,353 to be paid in the note of Emerson and Fitz, two notes of Webster in one and two years, and the balance, after deducting the amount of an outstanding mortgage, to be paid in cash; and that, in performance thereof, the Emerson & Fitz note was delivered to Emerson and cancelled, and the two $1,500 notes, dated November 16, 1857, made and executed; that, as the wife of said Emerson was not then in Boston, where this business was done, the two notes of $1,500 each and the money were not delivered to said Emerson until Webster was informed that the deed was executed and recorded; that on the 18th of December, 1857, Emerson was in Boston, and informed him (Webster) that the deed of the farm had been made and executed, and put on record, according to arrangement, and therefore he delivered the two notes to him and paid him the balance in cash, or its equivalent.

It will be seen, then, that the bill charges that the deed was not delivered to Webster, or any person for him, until after the attachment, and Webster's answer does not affirm that it was; and, therefore, the allegations in the bill not being denied are admitted by the 8th rule in chancery. Webster's answer goes no farther than to allege the making of the contract of sale, the giving of the note of Emerson & Fitz to Emerson, who cancelled it, and the making and executing of the two $1,500 notes, in performance of the contract, but that the two notes and cash balance were not delivered to Emerson until Webster was informed by Emerson, on the 18th of December, that the deed was made and recorded according to arrangement. Here is no allegation that the deed was delivered to Webster, or to any one for him; and what he does state is perfectly consistent with the allegations in the bill that there was no delivery, but that until the attachment the deed remained within the control of the grantor.

It is not stated that it was agreed that the deed should be delivered to the register of deeds for the grantee, or even that upon putting the deed upon record the price should be paid, but simply that the balance was not paid until the grantee was informed of the execution and

record. The statement that, on being informed by Emerson that it was executed and recorded according to agreement, the payment was made, falls far short of an allegation that by the agreement it was to be delivered to the register for the grantee, and to take effect on such delivery.

It would seem, then, that upon the bill or answer of Webster, it is to be taken that the deed was not delivered until after the attachment.

If the answer of Emerson as matter of pleading could avail Webster, it is by no means clear that it would amount to an allegation of a delivery of the deed. He states the bargain as Webster does, the delivery and cancelling of the Emerson & Fitz note, and the making of the two $1,500 notes, and he says "that by reason of Emerson's wife being in Chester, the conveyance, or deed of said farm, could not be fully executed at that time and place, and hence it was arranged that said Emerson should leave said two notes of $1,500 each, and the amount in cash, in the hands of Webster, until the deed should be executed by said Emerson and his wife, and put on record;" and he goes on to say that the deed was made the next day, but, owing to pressing calls and engagements, not put on record until December 17. This, it will be perceived, does not deny the allegations in the bill that there was no delivery, but states circumstances from which it might be urged that a delivery could be inferred. It does not, however, state that it was agreed that a delivery to the register should be a delivery to the grantee, or that, on delivery at the registry, the deed should take effect, but simply that the two notes and money should be left in the hands of the grantee, until the deed should be executed by Emerson and wife, and put on record; and it is not stated that on doing that the deed should be deemed to be delivered, or that the register should receive it for Webster; and we think, on the whole, that Emerson's answer falls short of that distinct and explicit denial of the allegations in the bill which is required. As with the answers so we think it is with the proof. Indeed, taking into consideration the refusal of Webster to testify, and the indefinite character of Emerson's statements, we are impressed with the belief that the answers go as far in denial of the allegations of the bill as the actual state of the facts would warrant.

That the mere sending of the deed to the registry for record is not a delivery is well settled; *Barnes* v. *Hatch*, 3 N. H. 304; *Maynard* v. *Maynard*, 10 Mass. 456; *Samson* v. *Thornton*, 3 Met. 281; *Oxnard* v. *Blake*, 45 Me. 602; even although the grantor intended it to take effect; for an acceptance by the grantee, express or implied, is necessary. 4 Kent Com. 455, 456. *Oxnard* v. *Blake*, 45 Me. 602, note, and cases before cited. *Jackson* v. *Phipps*, 12 Johns. 418. In this case it had been agreed between a creditor and debtor that the latter should give the former a deed of his farm as security, and accordingly the debtor made and executed the deed, and sent it to the registry to be recorded, without the grantee, or any one for him, being present, or receiving the delivery of it, and it was held that this was no delivery:

that a delivery *ex vi termini* imports that there be a recipient. And the case of *Jackson* v. *Dunlap*, 1 Johns. 114, is cited as holding that it is essential to the operation of a deed that the grantee assents to receive it, and that there could be no delivery without an acceptance. So is *Jackson* v. *Richards*, 6 Conn. 619, where it was held that an acceptance is essential, and that there was nothing in the act of recording equivalent to a delivery. To make the delivery effectual, the grantor must part with all control over the deed. *Cook* v. *Brown*, 34 N. H. 460, and cases cited; *Doe* v. *Knight*, 5 B. & C. 671. Where a loan and security by way of mortgage of real estate was agreed upon, and the mortgage made and recorded, and shortly after the money paid over and the note given, held, the mortgage took effect from the payment of the money. *Wood* v. *Barker*, 35 N. H. 386; *Parker* v. *Boston*, 22 N. H. 424. So is *Stevens* v. *Buffalo & N. Y. R. R.*, 20 Barb. 332; *Samson* v. *Thornton*, 3 Met. 281; *Parker* v. *Parker*, 1 Gray, 409. A delivery to the register of deeds for the use of the grantee, intending that it shall then take effect as a conveyance, with the assent of the grantee at the time, or afterward, is sufficient. 2 Greenl. Cru. Dig. tit. 32, ch. 2, § 64, and note; *Thayer* v. *Stark*, 6 Cush. 11. But a subsequent assent will not prevail against an intervening attachment, though, as between the parties, it would, by relation, give effect to the deed from the time of such delivery. *Ibid.*, and cases cited; *Harrison* v. *Phillips Academy*, 12 Mass. 461; *Jackson* v. *Rowland*, 6 Wend. 666; *Samson* v. *Thornton*, 3 Met. 281. And it is obvious that this must be so, because, until such assent, the title remains in the grantor. In *Canning* v. *Pinkham*, 1 N. H. 357, Woodbury, J., says that all that is incumbent on the grantee in order to perfect the delivery is that he accept or assent to what has been done by the grantor, before the latter revokes his intention to convey, and for this he refers to *Harrison* v. *Phillips Academy*, before cited.

And we think that an attachment by which all the interest of the grantor is taken, would be equivalent to such a revocation.

In the case before us we think that the proof is not sufficient to show a delivery of the deed to the register, or any other person, to the use of the grantee with his assent, with intent to place it beyond the control of the grantor, and to vest a present title in the grantee, but rather to place the parties in position to perfect the sale by payment of the price, and delivery of the deed at a future time, and leaving either party the power to decline to perfect the sale. It is true, the evidence tends to show that part of the price was paid; but that is only evidence bearing upon the question whether the parties agreed to a delivery to the register. *Samson* v. *Thornton*, before cited.

In an additional brief for the defendant, the case of *Merrills* v. *Swift*, 18 Conn. 257, 261, is cited and commented upon. In that case a debtor, in failing circumstances, executed a mortgage of certain real estate to a creditor, as security for his debt, and delivered it to a third person, as his deed, for the benefit of the grantee, but without his

knowledge at the time, he assenting to it, however, afterwards; and the court held that this was a good delivery, and vested the title at once in the grantee. This is put, however, upon the ground that the deed, being beneficial to the grantee, his assent was to be presumed; but such assent is not to be presumed unless the deed be clearly beneficial to the grantee, as in the case of a conveyance of property as collateral security for a debt, unattended with any conditions for delay or discharge, without full payment. In these and similar cases the assent of the creditor has been held to be presumed until a dissent is shown, for the reason that such security must be beneficial, and creditors would rarely be unwilling to receive it. See *Brooks* v. *Marbury*, 11 Wheat. 96. But it is held otherwise where conditions are annexed, such as that the creditors shall receive their proportion of the assets assigned, in full discharge of their debts, as in *Hurd* v. *Silsby*, 10 N. H. 108; so where the assignee lives out of the State, or his liability is limited to losses caused by his wilful default, as in *Spinney* v. *The Portsmouth Hosiery Company*, 25 N. H. 9; so where the assignment made provision for paying, first, a debt due to the trustee; then such creditors as might, within sixty days, become parties to the assignment; and thirdly, the debt of creditors named in a schedule, as in *Leeds* v. *Sayward*, 6 N. H. 83. In *Camp* v. *Camp*, 5 Conn. 291, where there was a lease by one who had no title to one who had already a good title, it was held that an acceptance could not be presumed. We think, indeed, that there is at the present time no disposition in the courts to extend the doctrine of presumed assent, for it seems to be the settled doctrine of the English courts, that when a debtor conveys property in trust for creditors, to whom the conveyance is not communicated, and the creditors are not in any manner privy to it, the conveyance operates only as a power to the trustee, which is revocable by the debtor in the same way as if he had given money to an agent to pay his creditors, to whom no communication had been made. *Acton* v. *Woodgate*, 2 Mylne & Keene, 492; *Smith* v. *Keating*, 6 M. G. & S. 136–158, where it was held that such power was revoked by the subsequent insolvency of the debtor. *Garrard* v. *Lord Lauderdale*, 3 Sim. 1; *Harland* v. *Binks*, 15 A. & E. 713; and strongly in the same direction is *Williams* v. *Everett*, 14 East, 529, and *Oxnard* v. *Blake*, 45 Maine, 602; see, also, *Wheeler* v. *Emerson*, 44 N. H. 182.

In the case before us the acceptance of the deed must be attended with an obligation to pay the price of the land, and therefore a duty would be imposed upon the grantee to which his actual assent would be necessary. It is not like the cases of conveyances for security without conditions, or grants of property as gifts, where the benefits are clear and unquestionable, but, like the conveyance of property in full discharge of a debt, it is for the grantee to decide whether it is or is not for his benefit, and then to assent or dissent, as he may deem best. The case of *Tompkins* v. *Wheeler*, 16 Pet. 106, also cited by the defendant, is a case of a conveyance to certain preferred creditors, in

trust for the payment of their debts, which conveyance, as appears from the answer of the debtor, was sent to the recorder's office for his creditors' use; and the court held that being absolute on its face, without any condition whatever attached to it, and it being for the benefit of the grantees, their assent was presumed. This, then, is like the case in Connecticut, where the conveyance was clearly beneficial. In *Hallick* v. *Sewell*, 4 Gilman, Ill 177, a deed to a purchaser at a tax sale, who had paid the price, was made and delivered by the officer to a stranger, and it was held that, no acceptance having been shown, there was no valid delivery. The general question was much considered, and the English and American cases reviewed; and in accordance with this decision it is laid down in 2 Washburn on Real Property, 580, that "although several of the cases seem to sustain the doctrine that a delivery of a deed to a stranger, for the grantee, where it is obviously for his benefit, passes the title at once as an effectual delivery, the better opinion seems to be that no deed can take effect, as having been delivered, until such act of delivery has been assented to by the grantee, or he shall have done something equivalent to an actual acceptance of it."

Our conclusion then is that there was no delivery until after the attachment: and therefore, upon making the amendments indicated, there must be a

Decree for the plaintiff.[1]

FISHER *v.* HALL.

COURT OF APPEALS OF NEW YORK. 1869.

[*Reported* 41 *N. Y.* 416.]

APPEAL from the judgment of the Supreme Court in the First Judicial District, affirming judgment for the plaintiff, on the report of W. T. McCoun, referee.

This action was brought by the plaintiffs, as devisees, under the will of Leonard Fisher, deceased, for the recovery of the possession of certain undivided interests in the premises situated in the city of New York, known as No. 66 Centre Street.

This will was executed in 1833, and the testator died February, 1834.

The defendants claimed title to the premises under a deed executed by Leonard Fisher, in his lifetime, dated September 19th, 1822, and retained among his papers until after the time of his decease, purporting to convey them to his son, George Fisher, and a deed executed and delivered by George Fisher to the defendant, James Hall. The issues in the action were referred to a referee, who reported in favor of the plaintiffs. From the judgment entered upon the report, the defendants appealed to the General Term of the Supreme Court in

[1] See *Johnson* v. *Farley*, 45 N. H. 505; *Hibberd* v. *Smith*, 67 Cal. 547.

the First District, where the judgment was affirmed. And the defendant then appealed to this court. The facts, with reference to the execution of the deed and its custody, are fully stated in the opinions.

Marshall S. Bidwell, for the appellant.

Benjamin G. Ferris and *Amasa J. Parker*, for the respondent.

DANIELS, J. The deed from Leonard Fisher, to his son, George Fisher, was dated on the 19th day of September, 1822, and from that time until the month of September, 1835, when Leonard Fisher died, it appears to have remained in his possession, for it was found among his papers after his decease. If the evidence of George Fisher, taken upon the trial, was to be credited, and that, under the circumstances, was for the referee to decide, he knew nothing of the deed until December, 1840, when he procured it from a trunk containing his father's papers, previously deposited by the executors of his father's estate, in the office of their counsel. The deed contained an attestation clause, which was subscribed by two witnesses, stating that it was sealed and delivered in their presence. But no evidence was given, or probably could be given, as the grantor and both the witnesses were dead before the trial, showing what actually did transpire when the deed was executed, beyond that contained in the proof made by one of the witnesses before the commissioner, at the instance of George Fisher, after he had obtained possession of the deed. By the oath of this witness, which was taken on that occasion, it appeared that Leonard Fisher, the grantor, executed the deed, and acknowledged that he had executed it. Nothing more than that was stated by this witness to have taken place at that time, except the fact that he became a subscribing witness to the deed. No declaration was stated to have been made by the grantor showing that he intended the instrument should then take effect as his deed, or that any formal delivery was made of it to any person for the use or benefit of his absent son, who was the grantee named in it. This witness was produced for the purpose of proving that the deed had been legally executed by the grantor; and it may therefore be presumed that he stated all that he was able to disclose on that subject when he was before the commissioner for that purpose.

It was alleged in the complaint that the deed was *executed* by Leonard Fisher. And this, it was insisted by the defendant's counsel, could be relied upon as conceding a legal delivery of the instrument. Such may be assumed to be the ordinary legal signification of this term, but it was not what was intended by them, when they were used in the complaint; for they were immediately followed by the qualifying and restricting averment, that the deed never was delivered by the grantor, or any one in his behalf, to George Fisher, but that it remained in the possession of Leonard Fisher until his decease, and was afterward found among his papers, and taken possession of by George Fisher, who was one of the executors. Instead of affirming, the complaint negatives the idea of a delivery of the deed, unless these facts

themselves legally support the conclusion sought to be derived from them.

Under this state of the pleadings and the evidence, the referee found that the deed had been subscribed and sealed by Leonard Fisher; that the witnesses attested it, under the clause stating that it had been sealed and delivered in their presence; that the grantee was not then present, and remained ignorant of the existence of the deed until long after the death of his father, and that the latter, during the period of thirteen years intervening between the date of the deed and his own decease, continually remained in the possession of the premises, and in the receipt of the rents and profits to his own use. By these facts the referee must have intended to be understood as finding that the deed was not in fact delivered, although he has failed to say so in so many words; for he afterward follows them with his legal conclusions, one of which was, that the deed never took effect for want of delivery. This was indispensable to the support of the conclusion he arrived at, and the statement just referred to indicates it to have been his purpose to find that as a fact.

The facts thus found by the referee, as well as those alleged in the complaint, are insufficient to constitute a delivery of this deed. It is not necessary that the grantee, or his agent or servant, should be present at the execution, in order to have such a delivery of the instrument made as will give it operative vitality and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that result. The mere subscribing and sealing, accompanied with the ordinary attestation of those acts by the witnesses, which is all that there is any reason for supposing was done in the present instance, followed by the grantor keeping the deed in his own custody, and his continued possession of the premises, are not sufficient to constitute a legal delivery of a sealed instrument. Several old authorities in equity were cited upon the argument for the purpose of showing the rule to be different from this statement of it. And it must be confessed that they appeared to maintain that result; but they are evidently so directly opposite to the entire current of modern authority, both in the courts of this and of the other States, as well as of the United States, as to require them to be repudiated by this court. A rule of law by which a voluntary deed, executed by the grantor, afterward retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property, as to deserve no toleration whatever from any intelligent court either of law or equity.

It was not sanctioned by anything required by the decision of *Doe* v. *Knight*, 5 B. & C. 671, for there the mortgage in controversy was made pursuant to an understanding on the part of the mortgagee that the debt due to him was to be secured by the mortgagor, and it was first declared by him to be his act and deed, and afterward actually delivered to his sister for the mortgagee. The case was tried before the jury, and so disposed of by the court upon the point whether even that was sufficient to constitute an effectual legal delivery; and it was held that it was, which was all that the case really decided. The case of *Souverbye* v. *Arden*, 1 John. Ch. 240, was equally as pointed in this respect in its circumstances; and the language of the chancellor, it will be found upon examination, was not designed to extend beyond them in his decision of this case. Id. 255, 6. In *Ruslin* v. *Shield*, 11 Georgia, 636, it was held that the attestation clause reciting that the deed was delivered, was not of itself sufficient to establish a delivery; and it was afterward held by the same court that there was no delivery of a deed, which the grantor concealed from the grantee, and held, not in subordination to him, but independent of his will, and with the intention that it should not go into his custody. *Rutledge* v. *Montgomery*, 30 Georgia, 641; see also *Critchfield* v. *Critchfield*, 24 Penn. 100. The authorities upon what is necessary to create a legal delivery of a deed, are well collected in part 2, Cowen & Hill's Notes [to Phil. Evid.], 3d ed., 826–31; and their general result is stated to be, that "to constitute a complete delivery of a deed, the grantor must do some act putting it beyond his power to revoke." "The delivery need not be to the party, but may be to another person, by sufficient authority from the party; or it may be to a stranger, for and in behalf and to the use of the party, without authority." Id. 826. And to the like effect are the cases of *Church* v. *Gilman*, 15 Wend. 656, 660, 661; *Stilwell* v. *Hubbard*, 20 Id. 44; *Merrills* v. *Swift*, 18 Conn. 257; *Tibbals* v. *Jacobs*, 31 Id. 428; *Bury* v. *Anderson*, 22 Ind. 36, 39; *Parmelee* v. *Simpson*, 5 Wallace, 81. In *Younge* v. *Gailbeau*, 3 Wallace, 636, 641, it was held that "the delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed, or the right to retain it." A delivery may be inferred from the fact that the grantor has had the deed recorded: but it is not necessary to refer to the cases sustaining that principle, because the absence of that fact renders them inapplicable to the present controversy. To bring this case within the rule already mentioned, enough should have been shown to have been done to render the grantor a mere bailee of the deed for the grantee. No such relation was either proved by the evidence or found by the referee from it; and no title to the land consequently vested by virtue of the deed in the grantee, and for that reason, he could convey none to the defendant Hall. *Critchfield* v. *Critchfield*, 24 Penn. 100. As the grantor, Leonard Fisher, did nothing, and neither permitted nor authorized anything

to be done or represented indicating that George Fisher owned the land described in the deed, there was no ground on which the principle of estoppel could be rendered applicable to the transaction.

All the judges concurring,

Judgment affirmed.[1]

JONES *v.* SWAYZE.

SUPREME COURT OF NEW JERSEY. 1880.

[*Reported* 42 *N. J. L.* 279.]

On case certified from Sussex County Circuit Court.

Argued at February Term, 1880, before the *Chief Justice*, and *Justices Dixon* and *Van Syckel*.

For the plaintiff, *Thomas Kays*.

For the defendant, *L. Van Blarcom*.

The opinion of the court was delivered by

VAN SYCKEL, J. In March, 1877, the plaintiff indorsed a promissory note for one Vancleve M. Swayze. On the trial of this cause, Jones testified that when he indorsed this note he asked Vancleve whether he could secure him, and he replied he could; that he had his crops, and that there was no danger but that he would protect him, and Jones replied it was all right then, and it was left in that way.

Vancleve testified that at the time he requested Jones to indorse the note, Jones asked him if there would be any trouble about meeting the note or paying it, and he replied that if there was any trouble he could secure him with his crops; that he should not lose anything; that he would secure him.

On the 21st day of May, 1877, Vancleve executed a chattel mortgage on his crops to Jones. It was drawn by Dawson Woodruff, and executed by Vancleve and left with Woodruff. It was filed in the clerk's office by Woodruff on May 23d, 1877, but it does not appear that there was any express instruction to Woodruff to deliver it to Jones or to file it, and Jones did not know that it had been executed or filed until the following August.

On the 9th of July, 1877, Vancleve executed a chattel mortgage on the same property to the defendant, Jacob L. Swayze, who subsequently sold the mortgaged chattels and appropriated the proceeds to his own use.

On the trial below the court instructed the jury that they should find a verdict for the plaintiff for the amount of the debt intended to be secured by his chattel mortgage.

Thereupon the case was certified for the advisory opinion of this court, the principal question being which of said mortgages was entitled to priority.

The leading case is *Garnons* v. *Knight*, 5 Barn. & Cress. 671, in which after a full discussion of the authorities, the court held that

[1] Only that part of the case which [illegible] the question of delivery is given.

delivery to a third person for the use of the party in whose favor the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.

In *Xenos* v. *Wickham*, 13 C. B. N. S. 381, reviewed in the Exchequer Chamber (14 C. B. N. S. 435,) and ultimately decided in the House of Lords (L. R. 2 H. L. 296,) it appears that the circumstances which go to make out a delivery are to be treated as indications of intention, and that the fact of delivery resolves itself into a question of intention. Mr. Justice Blackburn said that "as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying, 'I deliver this as my deed,' but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though of course if he has not previously assented to the making of the deed, the obligee may refuse it."

In *Garnons* v. *Knight*, Justice Bayley said:

"There could be no question but that delivery to a third person for the use of the party in whose favor the deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery; the law will presume, if nothing appears to the contrary, that a man accepts what is for his benefit."

That such is the presumption in the English law, until it is rebutted by proof of refusal to accept, will be found by an examination of the authorities referred to in the cases cited.

In this country there is some diversity of view upon the question whether delivery takes effect until an actual acceptance by the grantee.

In *Church* v. *Gilman*, 15 Wend. 656, Chief Justice Savage, after reviewing the earlier New York cases, said that if the delivery to the third person be absolute, the grantor not reserving any future control over the deed, the estate passes; the assent of the grantee to accept the conveyance being presumed from the fact that it is beneficial to him.

The same rule is recognized in *Ernst* v. *Read*, 49 Barb. 367, and in *Brown* v. *Austen*, 35 Barb. 342, where the English cases are cited with approbation.

In 2 Washb. on Real Prop. 581, the author says that "the better opinion seems to be that no deed can take effect as having been *bona fide* delivered until such act of delivery has been assented to by the grantee."

An examination of the cases cited will show that most of them do not support the text.

In *Maynard* v. *Maynard*, 10 Mass. 458, the facts testified to show that the grantor intended to keep control over the deed until he was more determined on the subject, and that case was put upon the ground that he retained authority over it.

In *Jackson* v. *Dunlap*, 1 Johns. Cas. 114, the grantor executed the deed, and was to retain it until the consideration money was paid.

In *Stephens* v. *Buffalo and New York R. R.*, 20 Barb. 332, it was rightly held that there was no delivery without an acceptance by the grantee, for in that case it appeared that the instrument was placed in the hands of a third person to be offered to the grantee, and he did not accept it.

Justice Field, in *Younge* v. *Guilbeau*, 3 Wall. 636, said, "that to constitute delivery of a deed the grantor must, as a general thing, part with the possession of it, or at least with the right to retain possession. Upon a question of delivery, its registry, if by him, is entitled to great consideration, and might, perhaps, in the absence of opposing evidence, justify a presumption of delivery."

The law is clearly stated by Chief Justice Gibson in 8 Watts, 11, where he says that "the rule to be extracted from the authorities is, that a delivery to a third person for the present use of the grantee makes the instrument a present deed; but that a delivery to his use when he shall perform a condition makes not a present deed, and the grant may be frustrated by his refusal to perform it; and that a bare delivery to a stranger, without words of direction to deliver over to the grantee either absolutely or conditionally, is merely void."

The delivery of a deed is a question of fact; the intent of the grantor to make the conveyance effective must appear.

"The court may instruct the jury to find for the plaintiff if the testimony is believed, when the whole testimony directly shows the main fact or shows such facts that therefrom the main fact is a positive or absolute inference of law. But when there is any conflicting testimony, or when only such facts are shown that therefrom the jury may infer the main fact, then the case should be left to the jury with proper instructions." *Lindsay* v. *Lindsay*, 11 Vt. 621.

To the same effect is *Murray* v. *Starr*, 2 Barn. & Cress. 82, that the question of delivery must be left as a question of fact to the jury upon the whole evidence in the cause.

See also *Hannah* v. *Scarner*, 8 Watts, 9.

The facts, as to which there was no conflict of testimony in this case, did not justify the peremptory instruction of the court below to the jury that they should find a verdict for the plaintiff, but upon the whole case it is clear that the plaintiff's mortgage was filed with the knowledge and consent of the mortgagor for the benefit of the plaintiff, in pursuance of the promise previously made by the mortgagor to secure the plaintiff. The verdict, therefore, was right, and the Circuit Court should be advised not to grant a new trial.

BOYD *v.* SLAYBACK.

SUPREME COURT OF CALIFORNIA. 1883.

[*Reported* 63 *Cal.* 493.]

APPEAL from a judgment of the Superior Court of San Diego County.

The action was brought against Robert Taggart, a minor, and against O. M. Slayback, as administrator of the estate of Mary B. Taggart, and as guardian of Robert Taggart, to quiet title to certain lands alleged to have been sold to the plaintiff by Mary B. Taggart. The plaintiff alleged that some time subsequent to the execution and delivery of the deeds to him, by which the lands were conveyed, they were left at the residence of Mrs. Taggart in a tin box, and that after her death it was discovered that the deeds had been abstracted. The defendant denied the execution and delivery. The deeds were not recorded.

The other facts appear in the opinion of the court.

Chase, *Arnold* and *Hunsacker*, and *Graves* and *Chapman*, for appellants.

Brunson and *Wells*, *M. A. Luce* and *Will M. Smith*, for respondent.

PER CURIAM.[1] The judgment must be reversed for error in the charge to the jury. The court below charged: "A grant, duly executed, is presumed to have been delivered; therefore, if you find from the evidence that Mrs. Taggart actually signed and acknowledged the deeds in question, the law will presume that they were duly delivered, and in order to defeat this presumption, the party disputing the delivery must show, by preponderance of proof, that there was no delivery."

This was error. A deed takes effect only from the time of its delivery. Without delivery of a deed it is void. No title will pass without delivery. 23 Cal. 528; 30 Cal. 208; 32 Cal. 610. It is for the party claiming under a deed to prove its delivery. Sometimes slight evidence will be sufficient to support a finding of delivery, but no legal presumption of delivery arises from the mere fact that the instrument is "signed." The acknowledgment only proves that it was signed.

Judgment reversed and cause remanded for a new trial.[2]

CANCELLATION OF DEEDS. — The cancellation of a deed does not destroy the estate created by it. *Ward* v. *Lumley*, 5 H. & N. 87 (1860). But where a grantee has voluntarily destroyed or surrendered his deed, he will not ordinarily be allowed to give parol evidence of its contents. See *Farrar* v. *Farrar*, 4 N. H. 191 (1827). Cf. *Bank of Newbury* v. *Eastman*, 44 N. H. 431 (1862).

As to the effect of the Registry Acts on the cancellation of deeds, see *Commonwealth* v. *Dudley*, 10 Mass. 403 (1813); *Holbrook* v. *Tirrell*, 9 Pick. 105 (1829); *Lawrence* v. *Stratton*, 6 Cush. 163 (1850).

[1] Part of the opinion relating to other points is omitted.

[2] See, *accord.*, *Alexander* v. *De Kermel*, 81 Ky. 345.

CHAPTER IX.[1]

ESTOPPEL.

NOKE *v.* AWDER.

QUEEN'S BENCH. 1595.

[*Eq. cas. Cas. E.* 373, 436.]

COVENANT. Wherein he shows that one John King made a lease for years to A. the defendant, who by deed granted it to Abel, and covenanted with him, that he and his assignees should peaceably enjoy it without interruption. Abel grants it to J. S., who grants the term to the plaintiff, who being ousted by a stranger, brings this action; and after issue joined upon a collateral matter, and after verdict for the plaintiff, it was alleged in arrest of judgment, that this action lay not for the second assignee, unless he could show the deed of the first covenant, and of the assignment, and of every mean assignment; for without deed none can be assignee to take advantage of any covenant, which cannot commence without deed; and to that purpose cited Old Act, 102; and 19 Edw. 2; Covenant, 25. And if one be enfeoffed with warranty to him his heirs and assignees, and the feoffee makes a feoffment over without deed, the assignee shall not take advantage of this warranty, because he hath not any deed of assignment. But if he had the deed, it should be otherwise: and to that purpose *vid.* 13 Edw. 3, Vouch. 17; 3 Edw. 3, *Monstrans de Fayts*, 37; 11 Edw. 4, Ibid. 164; 15 Edw. 2, Ibid. 11; 13 Hen. 7, 13 and 14, 22 Ass. plea, 88. But POPHAM held, that he shall have advantage without the deed of assignment: for there is a difference where a covenant is annexed to a thing, which of its nature cannot pass at the first without deed, and where not. For in the first case, the assignee ought to be in by deed, otherwise he shall not have advantage of the covenant; and therefore he denied the case of the feoffee with warranty: for the second feoffee shall have benefit of the warranty, although he doth not show the deed of assignment, but shows the deed of the warranty; and so is the better opinion of the books. And to that opinion the other Justices inclined. *Sed adjournatur.* *Vide* 3 Co. 63.

It was now moved again. And all the JUSTICES agreed, that the assignee shall have an action of covenant without showing any deed of the assignment: for it is a covenant which runs with the estate; and the estate being passed without deed, the assignee shall have the benefit of the covenant also; and the executor of the baron, who is assignee

[1] On the subject of this chapter, consult Rawle, Cov. for Title (5th ed.) c. 11.

in law, who comes in without deed, shall have the benefit of such a covenant, as appears 30 Edw. 3, in *Symkins Simonds' Case*. And POPHAM and FENNER held, that a feoffee shall vouch by a warranty made to his feoffor, without showing any deed of assignment: for the deed of assignment is not requisite, nor is it to any purpose to show it; for it appears by the books, that being shown, it is not traversable by the vouchee. And as a warranty or covenant is not grantable, nor to be assigned over without the estate; so when the estate passeth, although it be by parol, the warranty and covenant ensue it; and the assignee of the estate shall have the benefit thereof. *Coke*, Attorney-General (who was of counsel with the defendant), said, that the law was clear as you have taken it, yet the declaration is ill; for he declares, *quod cum Johannes King*, 10 Eliz., let that to the defendant for years, *virtute cujus* he was possessed, and granted it to Abel by indenture with the covenant, who in 15 Eliz. assigned it to the plaintiff: and further allegeth, that long time before that the said J. K. had anything, one Robert King was seised in fee, viz., 7 Eliz., and so seised, died seised in 15 Eliz. and it descended to Thomas King, who entered upon the plaintiff and ousted him: so he doth not show that John King who made the lease had anything: for Robert King was thereof then seised. And then when John King let to the defendant, and he granted his term by indenture, nothing passed but by estoppel; then the lessee by estoppel cannot assign anything over, and then the plaintiff is not an assignee to maintain this action. But admitting that J. K. had at the time of the lease made by him, a lease for a greater number of years, and that Robert King had the freehold, and thereof died seised, and so all might be true which is pleaded: then the entry of Thomas King upon the defendant is not lawful. So *quacunque via data*, this action cannot be maintained. And this point for the case of estoppel was adjudged in this court, in the case of *Armiger* v. *Purcas*, in a writ of error.

And all the COURT held here, that it was clear upon the matter shown, that the action lay not: for the plaintiff ought to have shown an estate by descent in J. King, at the time of the lease and assignment made, or an estate whereby he might make a lease, and that this was afterward determined: and so confess and avoid the estate in the lessor, otherwise this action of covenant lieth not; and it never lies upon the assignment of an estate by estoppel. Wherefore they were of opinion to have then given judgment against the plaintiff: but afterward they would advise until the next Term. — NOTE. This was continued until Trin. 41 Eliz., and then being moved again, all the JUSTICES resolved, that the assignee of a lease by estoppel, shall not take advantage of any covenant: but that it shall not be intended a lease by estoppel, but a lawful lease. But no sufficient title being shown to avoid it, it is then as an entry by a stranger without title, which is not any breach. Wherefore it was adjudged for the defendant.[1]

[1] See Rawle, Cov. for Title (5th ed.) §§ 232-236; 1 Sm. L. C. (13th ed.) 165 *et seq.*

ANDREW *v.* PEARCE.

COMMON PLEAS. 1805.

[*Reported* 1 *B. & P. N. R.* 158.]

SIR JAMES MANSFIELD, C. J.[1] This is an action of covenant, and the declaration states that Peter Best in 1764 demised the premises in question for 99 years to John Garland, and covenanted that he had good right to make such demise, and that Garland should quietly enjoy the premises during the said term; that Garland in 1791 assigned to Bennett, and Bennett in 1801 assigned to the plaintiff, who was ejected by Thomas Pearce under a title superior to that of Peter Best. The plea states that Peter Best, at the time of the demise, was seised of the premises in tail male, and, before the assignment by Bennett to the plaintiff, died so seised without heirs male of his body, whereupon the term of years ceased and determined. Upon these pleadings, it is clear that Peter Best had no power to make a demise of these premises to continue for 99 years if he should die without issue male; but that it was a good lease so long as he should live, and he might have lived till the end of 99 years. On this demurrer every fact is admitted. It is clear, therefore, that at the time when Bennett assigned to Andrew, Bennett had no interest in the premises; the lease is stated to have become absolutely void by the death of Peter Best without heir male. The lease then having become absolutely void, what could be the operation of the assignment by Bennett to Andrew? He could neither assign the lease nor any interest under it, because the lease was gone. What right of any sort had Bennett? If anything, it could only be a right of action on the covenant, and that could not be assigned by law. As the person who made the assignment had no interest in the premises, the assignment itself could have no operation. Consequently there is no ground upon which the present action can be maintained, and therefore judgment must be given for the defendant.

Judgment for the defendant.

Lens, Serjt., in support of the demurrer.

Praed, Serjt., *contra*.

[1] Only the opinion is given.

DOE d. CHRISTMAS *v.* OLIVER.

KING'S BENCH. 1829.

[*Reported* 10 *B. & C.* 181.]

BAYLEY, J.[1] This case depended upon the effect of a fine levied by a contingent remainder-man in fee. Ann Mary, the wife of Joseph Brooks Stephenson, was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes: and she and her husband conveyed the premises to Thomas Chandless for ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living, so that the contingency upon which the limitation of the fee to Mrs. Stephenson depended, happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term for ninety-nine years was vested. It was conceded upon the argument that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them by estoppel; but it was insisted that such fine operated by way of estoppel only; that it therefore only bound parties and privies, not strangers; that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy, but a stranger; and that as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. To support this position, the defendant relied upon the latter part of the judgment delivered by me in *Doe dem. Brune* v. *Martyn*, 8 B. & C. 497; and that part of the judgment certainly countenances the defendant's argument here. The reasoning, however, in that case, is founded upon the supposition that a fine by a contingent remainder-man operates by estoppel, *and by estoppel only*; its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision: whether it operated by estoppel only, or whether it had a further operation, was quite immaterial in that case; and the point did not there require that investigation, which the discussion in this case has made necessary. We have, therefore, given the point the further consideration it required, and are satisfied upon the authorities, that a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel only, but that it has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel: and that the fine operates upon that estate, as though that estate had been vested in the cognizors at the time the fine was levied.

In *Rawlins's Case*, 4 Co. 52, Cartwright demised land, not his, to Weston for six years; Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten: and it was resolved that the lease by Cartwright,

[1] The opinion only is given.

when he had nothing in the land, was good against him by conclusion; and when Rawlins re-demised to him, then was his interest *bound by the conclusion*; and when Cartwright re-demised to Rawlins, now was Rawlins concluded also. Rawlins, indeed, is bound as privy, because he comes in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright gets the land, his interest in it is bound. In *Wade* v. *Lower*, Poll. 54, A. D. 1672, Thomas, a contingent remainder-man in fee, leased to Grills for five hundred years, and levied a fine to Grills for five hundred years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and whether this lease was good against the heir of Thomas was the question. It was debated before Hale, C. J., and his opinion was, that the fine did operate at first by conclusion, and passed no interest, but bound the heir of Thomas; that the estate which came to the heir when the contingency happened fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied; and he cited *Rawlins's Case*, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord C. J. Hale, Wild, Ellis, and Windham, Justices, and they all agreed that the fine at first inured by estoppel; but that when the remainder came to the conusor's heir, he should claim in nature of a descent, and therefore should be bound by the estoppel; and then the estoppel was turned into an interest, and the cognizee had then an estate in the land. In *Trevivan* v. *Lawrence*, 6 Mod. 258; Ld. Raym. 1051, Lord Holt cites 39 Ass. 18, and speaks of an estoppel as running upon the land, and altering the interest of it, — as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick* v. *Edwards*, 3 P. Wms. 372 (1735), Lord Talbot must have considered a fine by a contingent remainder-man as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. In that case, lands were devised to A. and B. and the survivor of them, and the heirs of such survivor, in trust to sell; the master reported that they could not make a good title, because the fee would rest in neither till one died. On exceptions to the master's report, Lord Talbot held, that a fine by the trustees would pass a good title to the purchaser by estoppel; for though the fee were in abeyance, it was certain one of the two trustees must be the survivor, and entitled to the future interest, consequently, his heirs claiming under him would be estopped by reason of the fine of the ancestor to say, *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. And the next day he cited *Wade* v. *Lower*. Now, whether Lord Talbot were right in treating the fee

as in abeyance, and the limitation to the survivor and his heirs as a contingent remainder or not, it is evident he did so consider them; and he must have had the impression that the fine would have operated not by estoppel only, but by way of passing the estate to the purchaser, because, unless it had the latter operation as well as the former, it could not pass a good title to the purchaser.

In Fearne, *c.* 6, § 5 (edit. 1820, p. 365), it is said, "we are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Wade* v. *Lower*, he says, it was agreed that the contingent remainder descended to the cognisor's heir; and though the fine operated at first by conclusion, and passed no interest, yet the estoppel bound the heir; and that upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied.

Upon these authorities we are of opinion that the fine in this case had a double operation, — that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued; but that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel; the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having right under him, exactly what he would have had, had the contingency happened before the fine was levied.

Postea to the plaintiff.

Preston, for the plaintiffs.
N. R. Clarke, contra.

RIGHT d. JEFFERYS *v.* BUCKNELL.

King's Bench. 1831.

[*Reported* 2 *B.* & *Ad.* 278.]

This case was argued during the last term by *Platt* for the plaintiffs, and *Preston* for the defendants, before Lord Tenterden, C. J., Littledale, J., Taunton, J., and Patteson, J. The facts of the case, the arguments urged, and the authorities cited, are so fully stated and commented on in the judgment pronounced by the court that it is deemed unnecessary to detail them here.

Cur. adv. vult.

Lord Tenterden, C. J., in the course of this term, delivered the judgment of the court: —

This case came on upon a motion to enter a nonsuit. At the trial before the *Lord Chief Justice Tindal*, at the Summer Assizes for the

County of Kent, 1830, it appeared that the action was brought to recover two houses at Brompton in the parish of Chatham. As to one the learned judge was of opinion, that the ejectment would not lie for want of a notice to quit. As to the other, there was a verdict for the lessors of the plaintiff, subject to leave to enter a nonsuit. The facts proved were, that Thomas Jarvis the elder, having contracted to purchase the premises, was let into possession by order of the Court of Chancery on the 29th of December, 1808; and being let into possession, but never having had any conveyance executed to him, he afterwards, on the 24 of October, 1820, devised them to his son and heir, Thomas Jarvis, the younger. Upon his father's death the son entered, and on the 21st of January, 1823, he mortgaged the premises, by indentures of lease and release, to the lessors of the plaintiff. The lease and release were in the common form, excepting that in the latter there was a recital that the said Thomas Jarvis is legally or *equitably* entitled to the several messuages or dwelling-houses conveyed, and in the covenant for title, the releasor covenanted that he is and standeth lawfully or *equitably*, rightfully, absolutely, and solely seised in his demesne as of fee of and in, and otherwise well entitled to the said several messuages or dwelling-houses, &c. On the 1st and 2d of April, 1824, indentures of lease and release, under the contract of sale in 1808, were executed to Thomas Jarvis the younger, whereby he became seised of the legal estate in the premises, which he afterwards conveyed by mortgage, for a valuable consideration, to the defendant Henry Bucknell. There was no proof that Bucknell had any notice of the prior mortgage, and upon his mortgage all the title-deeds were delivered to him. In this action, he had come in under the common rule, and defended as landlord: the other defendants were the tenants in possession.

The question on which the court took time to consider was, whether the defendant, claiming under the mortgagor, Thomas Jarvis the younger, could set up as a defence against the lessors of the plaintiff, the legal estate acquired by him since their mortgage. And it has been argued for them that he, as representing the mortgagor, Thomas Jarvis, is estopped from doing so; and for this purpose, Co. Lit. 352 a; Lit. § 693; and the cases of *Bensley* v. *Burdon*, 2 Sim. & Stu. 519; *Helps* v. *Hereford*, 2 B. & A. 242; *Goodtitle* v. *Morse*, 3 T. R. 365; *Goodtitle* v. *Bailey*, Cowp. 597; *Goodtitle* v. *Morgan and Others*, 1 T. R. 755; *Doe d. Christmas* v. *Oliver*, 10 B. & C. 181; *Trevivan* v. *Lawrence*, 1 Salk. 276; 2 Ld. Raym. 1048, s. c.; and *Taylor* v. *Needham*, 2 Taunt. 278, were cited. Of these cases none are applicable to the point in question, except *Goodtitle* v. *Morgan* and *Bensley* v. *Burdon* (of which more presently), and *Helps* v. *Hereford* and *Doe* v. *Oliver*. The last two are cases of estoppels, arising out of fines levied before any interest vested; and there is no doubt that a fine may operate by way of estoppel, but the present is not the case of a fine. In § 693, Littleton, speaking with reference to the doctrine of remitter, says, "This is a remitter to him, if such taking of the estate be not by

deed indented, or by matter of record, which shall conclude or estop him;" and in Lord Coke's commentary on this passage, a deed indented is distinguished from a deed poll in this particular of remitter, for the deed poll is only the deed of the feoffor, donor, and lessor, but the deed indented is the deed of both parties, and, therefore, as well the taker as the giver is concluded. In 352 a, Lord Coke divides estoppels into three sorts, the second of which he thus defines: "By matter in writing, as *by deed indented*, by making of an acquittance by deed indented or deed poll, by defeasance by deed indented or deed poll." And there are many other authorities to show that estoppel may be by any indenture or deed poll. But upon this rule there are many qualifications and exceptions engrafted. It is a rule, that an estoppel should be certain to every intent, and, therefore, if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel; nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing to grant, or only a possibility; Co. Lit. 352 b, where this case is put: "An impropriation is made after the death of an incumbent, to a bishop and his successors. The bishop, by indenture, demiseth the parsonage for forty years, to begin after the death of the incumbent. The dean and chapter confirmeth it. The incumbent dieth. This demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent." This passage from Co. Lit. is adopted by Ch. B. Comyns in his Digest, Estoppel (E. 2). Now in the case at bar the very truth, that the mortgagor, Thomas Jarvis the younger, had only an equitable interest, is partly admitted: for the recital states in the alternative, that he is lawfully *or equitably* entitled, and the covenant for title is to the same effect. At all events, there is in this recital a want of that certainty of allegation which is necessary to make it an estoppel. Lord Holt lays it down in *Salter* v. *Kidley*, 1 Show. 59, that general recital is not an estoppel, though a recital of a particular fact is. And upon this the judgment of the Lord Chancellor in the recent case of *Beasley* v. *Burdon*, which was relied upon by the counsel for the lessors of the plaintiff, proceeded. The deed of release in that case recited, that Francis Tweddle the younger was, subject to his father's life estate, seised or possessed of, or well entitled to, the lands and tenements thereinafter mentioned in reversion or remainder; and by the deed he granted and released this remainder, and covenanted that he was seised of it for an indefeasible estate of inheritance. The present Master of the Rolls, then Vice-Chancellor, by whom this case was first decided, according to the report in 2 Sim. & Stu. 519, held, that this was an estoppel, upon the general ground that it was a deed indented, and that the nature of the conveyance, namely, lease and release, made no difference. The Lord Chancellor confirmed this judgment, 5 Russell's Ch. Rep., but put it on this solely, that it was an allegation of a particular fact, by which the party making it was concluded. That case, therefore, greatly differed from the present, in

which there is no certain precise averment in the deed of release of any seisin in T. Jarvis the younger, but a recital only, that he was legally or equitably entitled. We think, therefore, that this recital does not operate by way of estoppel.

We are of opinion, also, that the release whereby T. Jarvis granted, bargained, sold, aliened, remised, released, &c., the premises, does not by mere force of these words amount to an estoppel. Littleton lays it down, § 446, that "no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath, or may have, in the same tenements, without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseisor." To the same effect is *Wiseh's Case*, Hob. 45, and Perk. § 65, that where a son and heir joins in a *grant* in the lifetime of his father, while he has neither possession nor right in the matter granted, the grant is utterly void, and nothing passes. So here, if the release pass nothing but what the releasor lawfully had, and he had no legal title in the premises at the time of the release made, those who claim under him by a subsequent good title are at liberty to show this; and there is no implied estoppel, as appears from the authorities just cited, and the Year Books 19 Ed. 3, 14, 15; 45 Ass. 5; 46 Ass. 6; and Brook's construction of these books in his Abr. tit. Estoppel, pl. 146; 10 Vin. Abr., Estoppel (M).

The case was put in argument on another ground for the lessors of the plaintiff, namely, that it was within the common rule that a mortgagor cannot dispute the title of his mortgagee. Such a rule without reference to the technical doctrine of estoppel, undoubtedly is to be met with as laid down by Lord Holt, in Salkeld, and has been often recognized in modern times. But we are of opinion that it does not apply to the present case. Here, the defendant Bucknell claims, as a purchaser for a valuable consideration without notice, a legal interest which was not in T. Jarvis at the time of his mortgage to the lessors of the plaintiff, and T. Jarvis had then an equitable interest which passed to them, and which is not questioned, nor sought to be disturbed by the defence which Bucknell sets up. This case much resembles that of *Goodtitle* v. *Morgan*, where a second mortgagee without notice, who got in the legal title, by taking an assignment, from a trustee and the mortgagor, of an outstanding term assigned to attend the inheritance, was holden entitled to a legal preference against the first mortgagee.

There, as here, it might be said that he was bound by the same conclusion as the mortgagor, and should not question the right of the prior mortgagee. But the legal title prevailed there, and so we think it ought here. The consequence upon the whole is, the rule for entering a nonsuit must be absolute. *Rule absolute.*[1]

[1] See *Freeman* v. *Liberator Building Soc.*, 10 Ch. D. 15 (1878).

STURGEON *v.* WINGFIELD.

EXCHEQUER. 1846.

[*Reported* 15 *M. & W.* 224.]

THIS was an action of covenant, charging the defendant as the assignee of the estate of J. H. Hogarth, the lessor of a certain leasehold farm, with breach of covenant, in preserving, and not using his best endeavors to destroy, the rabbits upon the estate in question. The declaration stated, that on the 22d of May, 1828, by a certain indenture of lease, sealed, &c., made between the Rev. John Henry Hogarth of the one part, and the plaintiff of the other, the said J. H. Hogarth demised to the plaintiff a certain messuage and lands in Essex, for twenty-one years; that J. H. Hogarth did, for himself, his heirs and assigns, covenant, that the rabbits on the said farm were not to be preserved, but that he and they would use their best endeavors to kill and keep down the rabbits on the said lands; that the plaintiff entered, and was possessed thereof for the said term so demised, the reversion thereof belonging to the said John Henry Hogarth, and that the reversion, during the continuance of the said demise and term, to wit, on the 1st of January, 1835, by assignment thereof came to and legally vested in the defendant. Breach, that the defendant did not use his best endeavors to kill, destroy, and keep down the rabbits on the said lands. The defendant pleaded, among other pleas, first, that the said J. H. Hogarth did not demise to the plaintiff; secondly, that the reversion mentioned in the declaration never legally vested in the defendant.

The cause came on for trial before *Pollock*, C. B., at the Middlesex Sittings after Trinity Term, 1845, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of this court upon the following special case, and to a reference as to the amount of damages, if the decision of the court should be in favor of the plaintiff.

On the 22d of May, 1828, the indenture of lease in the declaration mentioned, being of a farm at Stifford, in Essex, for twenty-one years from the 24th of June then last past, at a yearly rent of £221 7*s.* 6*d.*, was duly executed by the lessor, the Rev. John Henry Hogarth, in the declaration mentioned, and by the plaintiff, the lessee. The plaintiff entered into possession of and still holds the farm under the lease, and he paid the rent reserved to the lessor Hogarth, up to Christmas, 1835; and from that period he has continued to pay to the defendant rent under the lease, and the defendant has treated the plaintiff as his tenant of the farm in question. For several years past, the plaintiff has complained that the rabbits on the farm have not been kept down, and that, in consequence, his crops have been very much damaged, and much

correspondence has taken place between the plaintiff and defendant as to the amount of damage.

[The case then set forth two letters from the defendant to the plaintiff, in which the former expressed his willingness, on certain terms, to make compensation for the injury done by the rabbits.]

The farm in question was, by an indenture made and dated the 12th of May, 1742, demised by the keepers or wardens and society of the art or mystery of the Broderers of the city of London, to Samuel Foster, for the term of 100 years from Michaelmas, 1741, with a covenant for perpetual renewal. On the 25th of August, 1827, the residue then unexpired of that term became vested in William Bray, who, by an indenture made and dated the 25th of August, 1827, assigned the said residue of the said term, the same being then vested in him, to Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, by way of mortgage, to secure £5000 and interest, with a proviso for redemption on payment within twelve months. After the said residue of the said term had become thus vested in the said Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, the indenture of lease mentioned in the declaration was made. After the making of the indenture of lease mentioned in the declaration, an indenture, dated the 12th of January, 1836, was that day made between the said R. Fleming and the said James Elmslie of the first part, the said Thomas George Vander Gucht and (the said W. Green being then dead) the said John Henry Hogarth of the second part, William Wingfield of the third part, and Richard Baker Wingfield of the fourth part, and the said keepers or wardens and society of the art or mystery of the Broderers of the city of London of the fifth part; by which last-mentioned indenture, the said Richard Fleming, James Elmslie, and John Henry Hogarth, and each of them, purported to assign, surrender, and yield up, demise, release, and quitclaim, unto the said keepers or wardens and society, and their successors and assigns, the said farm, with the appurtenances, together with certain hereditaments and premises therein mentioned, for all the remainder then to come and unexpired, trust, possession, property, benefit of renewal, claim, and demand whatsoever, both at law and in equity, of them the said Richard Fleming, James Elmslie, and John Henry Hogarth, and every of them, of, in, to, or out of the said farm and appurtenances, and any and every part or parcel thereof, and also the covenant contained in the said indenture in the declaration mentioned for the renewal or re-grant of the lease or demise of the said farm, and all and every other covenant or covenants, if any then existing, in or in respect of any former or prior lease of the said term, or otherwise howsoever, to the intent that the residue then to come of the said term might be merged and extinguished in the reversion of the said farm, and that the said covenant or covenants for renewal might be absolutely and forever extinguished, determined, and discharged. After the making of this indenture of January 12th, 1836, the said keepers or

wardens and society of the art and mystery of Broderers of the city of London, by an indenture made and dated January 13th, 1836, demised the same farm to the said John Henry Hogarth, for the term of 100 years from Michaelmas, 1835; and by an indenture, made and dated February 4th, 1836, the unexpired residue of the said term became and was, and thence hitherto has been, vested in the defendant.

The leases, indentures, and documents mentioned in this case, and also the pleadings in the action, are to form part of the case, and are to be considered as embodied in it.

The question for the opinion of the court is, whether the plaintiff is entitled to a verdict on the two first issues, or either of them. If on both, the verdict is to stand, and the amount of damages to be referred; and if only on one of those issues, or on neither, a nonsuit is to be entered. The court is to be at liberty to draw the same conclusions and inferences of fact as a jury might have done.

Cowling, for the plaintiff.

Peacock, for the defendant.

PARKE, B. On the first issue, the verdict clearly must be entered for the plaintiff, that there was such a demise to him as is stated in the declaration. Then, as to the second point, all the reversion of Hogarth, which was a reversion by estoppel, passed from him to the defendant. This estoppel was fed by the demise for one hundred years from the Broderers' Company to Hogarth, the lessor, and thereby the lease from him to the plaintiff became good in point of interest. That lease for 100 years was afterwards assigned to the defendant, and therefore the second issue also ought to be found for the plaintiff.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

CUTHBERTSON *v.* IRVING.

EXCHEQUER. 1859.

[*Reported* 4 *H. & N.* 742.]

MARTIN, B.[1] This is an action of covenant by the plaintiff, the assignee of an alleged reversion, against the defendant, a lessee, for breach of a covenant to repair, and some other covenants which in ordinary circumstances would run with the reversion. The declaration, after stating the lease and covenants, alleges that John Biglands, the lessor, by a deed, assigned the premises comprised in the lease to the plaintiff; whereby the reversion thereof, subject to the term created by the lease, came to and vested in the plaintiff. The second plea states that John Biglands did not assign the said premises to the

[1] Only the opinion is given.

plaintiff, nor had he at the time of the making the lease any reversion of and in the said premises, nor did any reversion in the premises come to the plaintiff. There were other pleas, to one of which there was a demurrer. The issues in fact came on to be tried at the Carlisle Spring Assizes, 1859, when the cause was referred to a gentleman at the bar to state a special case for the opinion of the court.

The following are the material facts stated by him: John Biglands, being mortgagor in possession, on the 22d February, 1848, by an indenture of lease, executed by him and the defendant, demised the premises to the defendant for seven years, from the 1st August, 1848, at a rent of £90 per annum. The lease contains the covenants declared on, and they are stated to be made *with John Biglands, his heirs and assigns*. At the time of the execution of the lease the defendant was in possession under a former lease, and has continued in possession during the whole term demised. On the 2d February, 1854, John Biglands executed a deed, which purported to be made between him of the first part, Benjamin Biglands of the second part, the plaintiff of the third part, and one Huthwaite of the fourth part, which recited that by an indenture of the 7th June, 1844, the premises demised, and others, were conveyed by way of mortgage to Benjamin Biglands to secure a sum of money then unpaid, and that John Biglands had sold the equity of redemption to the plaintiff for £3,050. The deed then witnessed, that John Biglands granted, bargained and sold, aliened, released and surrendered the premises (by the same description as in the lease), and all his estate, right, and title, both at law and equity, therein to the plaintiff, to have and to hold to him, his heirs and assigns, forever, according to the custom of the manor of Little Broughton and Birkby, subject to the customary finable rent of 3*s*. 6*d*. per annum. The tenure of the land is stated in the deed to be as follows: "All which premises, &c., are now held by Thomas Rae of Henry Wyndham, as a customary estate of inheritance and parcel of his manor of Little Broughton and Birkby, by payment of the apportioned yearly customary finable rent of 3*s*. 6*d*.;" and it is found by the arbitrator that this is the true tenure, and that the mortgage is truly recited in the deed. The deed was executed by John Biglands, but by no other person. The defendant paid his rent to John Biglands until the execution of the deed, and after that time to the plaintiff; and he was treated by them respectively as their tenant. The questions submitted to the court are, First, how the verdict as to the second issue is to be entered. Secondly, what the judgment ought to be on the demurrer.

Two points were made by the defendant. It was admitted that the plea demurred to was bad; but it was contended that the declaration was bad also, for not alleging that the lessor was seised of some estate which by assignment would pass to the plaintiff as assignee. The precedents are uniform in containing such an allegation, and the departure from accustomed form is to be deprecated. We think, however, sufficient appears in the declaration to show that the plaintiff claims to

be assignee of an estate in reversion, and therefore this objection would only have been open, if at all, on a special demurrer. As we stated during the argument, the remedy for the defendant was by an application under the 52d section of the Common Law Procedure Act, 1852. The judgment on the demurrer therefore to be for the plaintiff.

The second objection is, that the case shows that the lessor had no legal estate in the premises demised at the time of the lease, and therefore had no estate in reversion to assign; and, consequently, the plaintiff was not an assignee within the meaning of the Statute 32d Hen. 8, *c.* 34; and as the deed of assignment to the plaintiff, under the old system of pleading, would have shown on oyer the want of legal title, and the objection would then have appeared on the record, and as now, of necessity, it appeared in evidence on the plaintiff's own case, there could be no estoppel.

Upon consideration, we think the authorities show that the defendant is estopped from disputing that the lessor was seised of an estate in reversion, and, as there are apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continues in his favor notwithstanding the assignment to him shows the want of title. The estate in reversion by estoppel was created before the assignment was executed, and in our opinion was not destroyed by it.

It would have been otherwise if the want of title had appeared on the face of the lease itself; in that case, the true facts being there disclosed, there would be no estoppel at all. *Purgetor* v. *Harris*, 7 Q. B. 708. There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease. Secondly, where a lessor by deed grants a lease without title and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel; and an action will lie by the assignee of the reversion against the tenant on the covenants in the lease, *Webb* v. *Austin*, 7 Man. & G. 701, and 8 Scott, N. R. 419; and by the tenant against the assignee of the reversion, *Sturgeon* v. *Wingfield*, 15 M. & W. 224. A question which further arises is that in the present case, viz., whether the assignee of a lessor in a lease by deed, who has no estate in the land, has a reversion by estoppel as against the lessee. This question arises not infrequently, as in the present instance, where a mortgagor makes a lease by deed and assigns his equity of redemption with words that would pass a legal reversion in fee. It seems clearly established, that upon a mortgage of lands, whatever the title of the mortgagor may be, his subsequent possession or occupation is at the will of the mortgagee, and he has nothing in the land whereout any interest can pass to a tenant, so as to affect the right of the mortgagee; and that in the present instance no further or other interest passed to the

defendant than by estoppel. Thus far seems plain: but upon the remaining part of the question the authorities unfortunately are not uniform. In the first case on the subject, *Noke* v. *Awder*, Cro. Eliz. 436, Moore, 419, it was supposed to be established that covenant never lay by the assignee upon the assignment of an estate by estoppel. This is adopted in Com. Dig. Covenant (B. 3), and in several other books. The question however did not arise, and was not necessary for the decision of the case: see *Palmer* v. *Ekins*, 2 Lord Raym. 1550, and the note of the learned editor of Smith's Leading Cases, vol. 1, 58 e, *Spencer's Case*. In *Whitton* v. *Peacock*, 2 Bing. N. C. 411, which was a case out of Chancery sent to the Court of Common Pleas, and where the reasons are not given for the judgment: it is to be inferred from the facts and the arguments, that the judgment proceeded on the ground that the assignee of a reversion by estoppel could not maintain an action for breach of the covenants in the lease. In a subsequent case, *Gouldsworth* v. *Knights*, 11 M. & W. 337, Parke, B., says, *Whitton* v. *Peacock* was correctly decided, but not for the reason supposed, but for that the reversion by estoppel was not of a copyhold nature and could not pass by surrender and admittance, and there being no deed by which the reversion by estoppel could pass to the assignee, the judgment was right. (See also the subsequent case of *Webb* v. *Austen*, 7 Man. & G. 701, and the observations there of Tindal, C. J., upon the case of *Gouldsworth* v. *Knights*; and also the elaborate argument in the case of *Pargeter* v. *Harris*, 7 Q. B. 708, and the *dictum* of Wightman, J., at page 722, "that several cases show that in leases by estoppel the assignee does not take the legal right to sue on covenants.")

The case of *Carrick* v. *Blagrave*, 1 Brod. & Bing. 531, cited on the argument, only shows that the allegation of the interest of the lessor in the declaration is traversable, and does not affect the present question. Later cases however have laid down that the estoppel on a lease by indenture, where the lessor has no title, extends to the assignee of the lessor and that he takes a reversion by estoppel, and is capable to sue on the covenants in the lease as an assignee of the reversion. The case of *Gouldsworth* v. *Knights* is to this effect: It was a tenancy from year to year: the lessors (trustees) had assigned their interest to the defendant: it was assumed the legal estate was not in them, and a question was raised whether the defendants, assignees of the lessor, could distrain. Parke, B., said: "The tenant is estopped from disputing the title of the old trustees, and is he not estopped as to the title assigned to the new trustees?" And this view is assented to and affirmed by the judgment of the court. In *Sturgeon* v. *Wingfield* the same view will be found laid down by the same learned judge. That was a case where the lease by indenture was originally good only by estoppel, and the supposed reversion was assigned to the defendant, together with a subsequently acquired legal term for years which fed the estopped. His Lordship said, that taking it that in point of fact

the lessor had no interest originally, there was an estate by estoppel, and that the estate was *prima facie* an estate in fee simple. *Palmer* v. *Ekins* was an action by the assignee of the reversion against the lessee for non-payment of rent. Plea: That the lessee, before making the lease, conveyed his estate to another: it was held that the plea simply amounted to a special *nil habuit in tenementis*, and was bad: and Lord Raymond, in giving the judgment of the court, expressly says "that the assignee shall take advantage of the estoppel." The note of Serjt. Williams to *Walton* v. *Waterhouse*, in 2 Saund. p. 418 a, is, "where the grantor or lessor has nothing in the land at the time of the grant or lease, and therefore no interest passes out of him to the grantee or lessee by the grant or lease, but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land" (and it is presumed with the reversion also), "into whose hands soever it comes, whether heir or assignee." We adopt this note as the right statement of the law, and in that the following propositions may be laid down: First, if any estate or interest passes from the lessor, or the real title is shown upon the face of the lease, there is no estoppel at all. Secondly, if the lessor have no title, and the lessee be evicted by him who has title paramount, the lessee can plead this and establish a defence to any action brought against him. *Doe d. Higginbotham* v. *Barton*, 11 A. & E. 307; but, thirdly, so long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded upon the fact that the lessor *nil habuit in tenementis;* and that upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee. A pleading test may be applied. Had the plaintiff declared that Biglands was seised in fee and demised to the defendant and assigned his reversion to the plaintiff, the defendant could not effectually have traversed the assignment. Could he the seisin? The plaintiff would have made a *prima facie* case by showing the lease to the defendant, and possession taken and enjoyed under it. The defendant could not have shown any other estate in Biglands. He must therefore have said Biglands *nil habuit in tenementis*. We are of opinion that the law will not permit him to do so. This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is? All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it. For these reasons we think the verdict on the second issue ought to be entered for the plaintiff.

It may be proper to mention that it would appear from the deed of conveyance of the 2d February, 1854, that the lands were customary

lands of a tenure common in Cumberland, and that the legal estate was in Thomas Rae. The estate both of mortgagor and mortgagee would therefore be equitable estates, and according to the opinion of Baron Parke, expressed in *Goodsworth* v. *Knights*, the reversion by estoppel would be an estate in fee simple, and it was not contended that the conveyance to the plaintiff was not sufficient to pass such a reversion, had it really existed.

Judgment for the plaintiff.

Crompton Hutton argued for the plaintiff.

Udall, for the defendant.

SOMES *v.* SKINNER.

Supreme Judicial Court of Massachusetts. 1825.

[*Reported* 3 *Pick.* 52.]

This was a writ of *entry sur disseisin*, in which the administrator of Nehemiah Somes demanded of John Skinner seisin of a tenement in Boston, counting upon the seisin of William S. Skinner on the 8th of January 1811, and a conveyance by him on that day to the intestate in fee and in mortgage, and alleging a disseisin done by the tenant to the intestate. The tenant pleaded *Non disseisivit*, and on that plea issue was joined.

To prove the seisin of the intestate the demandant produced a deed of mortgage from W. S. S. to the intestate, dated the 8th of January 1811, and recorded in September 1812, conditioned for the payment of 4000 dollars; which condition had never been performed.

In defence the tenant produced a deed from his father, John Skinner, to W. S. S. in fee simple with warranty, dated in December 1804, and recorded in April 1805. Also a deed from W. S. S. to the same J. S., dated in March 1805, and recorded in March 1807. Also a deed of mortgage from W. S. S. to Stephen Codman (who had no notice of the deed last mentioned), dated the 1st of July 1805, and recorded on the 10th of the same month, to secure the sum of 4,000 dollars, payable in three years from December 1804, with interest annually.

On the 8th of January 1811, Codman, for the consideration of one dollar, made a deed of release and quitclaim to the intestate, "meaning thereby to assign all his right under the mortgage and possession taken under the same," and delivered over to him the deed of mortgage; and on the same day the intestate, for the consideration of one dollar, executed and delivered a deed of release and quitclaim to W. S. S. and took from him the deed of mortgage first mentioned.

J. S. the father lived on the premises during all the conveyances, and until his death in 1813; after which his son the tenant moved on. J. S. the father left three sons, John the tenant, William S. before

mentioned, and Richard who died unmarried and without issue in August 1817.

The tenant contended, that in consequence of the quitclaim from the intestate to W. S. S. his father became seised by virtue of the deed to him of March 1805.

The demandant contended that the assignment from Codman to the intestate, the quitclaim from the intestate to W. S. S. and the mortgage from W. S. S. to the intestate, were all one transaction for the purpose of more conveniently securing the money lent by the intestate, and that in law the title was perfect in the intestate; but that if this were not so, still the demandant was entitled to a moiety of the premises by reason of its having descended from J. S. the father to W. S. S.

A verdict was taken by consent for the demandant, which was to be confirmed in the whole, or to be altered so as to stand for an undivided moiety, or to be set aside and the demandant to be nonsuited, according as the court should determine the law.

The case was twice argued, first at March Term 1823, and again at March Term 1824.

Prescott and *G. Sullivan*, for the demandant.

W. Sullivan and *Harrington*, for the tenant.

PARKER, C. J., delivered the opinion of the court. [After stating the facts.] It appears from the foregoing recital, that on the 1st of July 1805 Codman became seised in fee and in mortgage of the estate by virtue of the deed to him, the prior deed of W. S. S. to his father not having been registered until after that time, and Codman having no knowledge of the prior deed. But as the deed to J. S. the father was registered afterwards, and before any assignment of the mortgage by Codman, J. S. the father was seised of the equity of redemption of that mortgage. The deed of release and quitclaim of Codman to the intestate made for a valuable consideration, with the delivery over of the mortgage deed, operated as an assignment of the mortgage to him, so that on the execution of that release the intestate became seised of the legal estate, and the equity of redemption was in J. S. the father. Thus no estate whatever remained in W. S. S. and a discharge of the mortgage would vest an indefeasible estate in his father. But the intestate, on the 8th of January 1811, made his deed of release to W. S. S.; and a principal question is, whether any and what estate passed to W. S. S. by virtue of that deed. If, as contended by the counsel for the demandant, it passed the legal estate as a bargain and sale, or as an assignment to him of the mortgage, then his deed made on the same day to the intestate vested the estate in him, and he would be seised so as to support his action. If it amounted only to a discharge of Codman's mortgage, then the effect would be to relieve the title of J. S. the father from an encumbrance and he would be the lawful owner and the only person seised of the estate. We have labored much to come to the conclusion contended for by the demandant's counsel, as the equity of the case is clearly on that side, so far as we can judge from the con-

veyances, but we find ourselves met at every step by rules of law which our duty will not allow us to neglect. It is impossible to consider the deeds between the intestate and W. S. S. as conveying a momentary seisin to the latter and a restoration of the title to the former in the shape of a mortgage, because the release to W. S. S. conveyed no estate, he not being in possession nor having any title at the time, nor can it be considered as an assignment of the mortgage of Codman to him, for he, being the mortgagor and having conveyed the equity of redemption by the legal effect of his deed to his father, could not at the same time stand on the footing of a mortgagee with power to convey to the prejudice of his father; so that the only effect which the release to him could have, was to discharge the mortgage, and then J. S. the father, who held the equity of redemption and was in possession, became the legal owner of the estate, and thus the intestate, by this blundering system of conveyancing, lost the benefit of his mortgage. We see no way of coming to a different conclusion.

But there is another branch of the case attended with equal difficulties. J. S. the father died in 1813; and W. S. S., who mortgaged to the intestate, and J. S. the tenant, together with R. S., who is dead, became his only heirs. The title to a moiety of the premises, R. S. having died without issue and unmarried, thus came to W. S. S., and by virtue of his deed and the operation of law his right in the estate would inure to the intestate by way of estoppel or rebutter, so that if this action were against W. S. S. or his heirs, or any person claiming by or through him, they would be estopped to deny the title of the demandant. J. S. the tenant is a stranger to the deed of his brother, and he is not privy in estate, his title to one moiety of the tenement being independent of him, and the question is, whether he is bound by the estoppel, so that he cannot be allowed to say that nothing passed by the deed of W. S. S. to the intestate, as to the other moiety in which he has no right. On this point we have made considerable research, but without gaining much light. The old books are obscure on the subject and somewhat contradictory. In 2 H. 6, 2, it is said that a stranger cannot say *riens passa per le fait*, but the court was divided; and in 2 H. 4, 21 and 22, it is stated that a stranger shall not plead *non est factum*, but may plead *riens passa per le fait*, and this probably is the law. Certainly this has been the practice with us, for nothing is more common than, in the trial of real actions or actions of trespass *quare clausum*, for one party to avoid the effect of a deed produced by the other, by showing that the grantor was not seised and so nothing passed by his deed. Whether this is confined to the case of the disseisin of the grantor, or is applicable to other cases of an ineffectual deed, may be doubted, but the party in possession against whom a mere quitclaim is produced, may always avoid it by showing that the releasee was not in possession and so took nothing by the deed. In the case of a deed of bargain and sale it would seem that an adverse seisin would be required to defeat its operation, otherwise there seems to be

no good reason why a stranger should question its operation. For it would seem to be a strange doctrine, that one who held title by deed, unimpeachable by the grantor, his heirs, or any privies in estate, should not be able to maintain his title against a mere trespasser, or one who has no legal interest in the land; but such is the law, provided a stranger may question his right on the ground that nothing passed by the deed because the grantor at the making of it had nothing in the land.

There are some authorities which look as if this absurdity did not exist, but they are not so explicit as we could wish. Thus it is stated in the marginal note to the case of *Trevivan* v. *Lawrence*, 1 Salk. 276, that where an estoppel works an *interest in the land*, it runs with the land and is a title. The authorities cited however do not fully bear out this position, only going to show that all parties, privies, &c. are bound by the estoppel, but in the case itself it is laid down by Lord Holt, that where an estoppel works *on the interest of the land* it runs with it into whose hands soever the land shall come, and that *an ejectment is maintainable on a mere estoppel*. Unless this were intended to be restricted to ejectment against those who were parties or privies to the instrument creating the estoppel, here is authority for the present case, and there is nothing in the case cited suggesting such a qualification. And as Lord Coke lays down the principle, that not only parties and privies in estate, but all those who *come in in the post*, are bound by an estoppel, perhaps the above position of Lord Holt, that an ejectment may be maintained on an estoppel, is correct and general in its application. Co. Lit. 352 b.

And this should seem to be the ground of decision in the following case from 1 Rol. Abr. 868, Estoppel, K, pl. 3. A disseises B of land, and afterwards B suffers a common recovery in which the *præcipe* is brought against B, and by the record the sheriff puts the recoveror in possession upon a writ of *habere facias seisinam*: then C, a stranger, enters upon A and disseises him, upon which the recoveror enters; and his entry is lawful, for although B was not a good tenant to the *præcipe*, still this is a good recovery by estoppel against B, his heirs and assigns, it being fee-simple land, and binds all except A, who was seised of the land at the time of the recovery, and therefore by consequence shall estop C, who claims not under A, but comes in, *after the recovery*, by disseisin. The principle of this case, if applied to the case before us, will warrant a decision in favor of the demandant for so much of the land as came to W. S. S. on the death of his father and brother Richard. The intestate had a title against W. S. S. his heirs and assigns by way of estoppel created by deed with warranty; this title inured or operated upon the land at the moment the descent was cast on W. S. S. The tenant is a stranger to this title, and having entered upon the land claiming the whole and defending it by his plea of *non disseisivit*, he must yield to the intestate, who stands in the place of recoveror in the above cited case, and the estoppel under which he claims shall bind the tenant, because as to the moiety of W. S. S. the tenant comes in

after the estoppel and that by disseisin, because by his plea he defends on a title which he has not.

There are other cases which, though not directly in point, seem to recognize the principle involved in these which have been cited. The general doctrine that an estoppel which works upon real estate is not a mere conclusion but may pass an interest and constitute a title, is discussed at some length in the case of *Weale* v. *Lower*, Pollexf. 66. It is there laid down by Lord Chief Justice Hale, and the position is sanctioned by all the judges called to his assistance, in regard to a fine, which when it was levied passed no interest because the estate on which it was to operate was contingent, "that the estate upon the happening of the contingency feeds this estoppel, and then the estate by estoppel becometh an estate in interest, and *shall be of the same effect* as if the contingency had happened before the fine levied." The doctrine thus laid down is recognized in 2 Cruise's Dig. 452, tit. 16, Remainder, c. 8, §§ 19, 20. The same doctrine is maintained in *Smith* v. *Stapleton*, Plowd. 434; *Rawlyns' Case*, 4 Co. 53, 54; Bac. Abr. Leases, O.; Com. Dig. Estoppel, E. 10; Co. Lit. 47 b, n. 307. The general principle to be deduced from all these authorities is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor. And if this be law, there cannot be any sound principle which should limit a title thus acquired to a claim by the grantor or his representatives. It would be but a feeble title which would not enable the holder to defend his possession against trespassers, or those who should attempt to disseise him after his title is established. Nor does the doctrine in any degree tend to set up or give validity to conveyances made in violation of the Statutes against champerty, maintenance, or buying of pretended titles, which may be considered as part of our common law, for if they are avoided it is because the seisin was in other persons at the time of the conveyance holding adversely, and this known to the parties; whereas, according to the doctrine maintained, it is only against those who have sold the land and received the equivalent, and those who claim under them, and against mere strangers who usurp the possession without right or title, that the principle is to be applied.

It has been the common understanding, that when one supposing he has a title, though in fact he has none, for a valuable consideration conveys land by deed with warranty, and afterwards purchases, that his new title shall accrue to the benefit of his grantee. There are many cases which seem to be founded upon this principle. Thus in the case of *Tarrett* v. *Taylor*, 9 Cranch, 43, it was held that a deed which did not operate by way of grant to convey a fee, yet having a general warranty binding the grantor and his heirs forever, operated by way of estoppel to confirm a title, and the deed thus operating was set up

against the defendants who were not parties nor privies, but came in in the *post* under another title. This tacitly admits the doctrine we are maintaining, for the action could not have been supported without such admission. And the case of *Mason* v. *Muncaster*, 9 Wheat. 454, was decided on the same principle. The same doctrine is recognized in several New York cases. Thus in *Jackson* v. *Matsdorf*, 11 Johns. Rep. 97, Thompson, C. J., says a deed containing a warranty will pass any title subsequently acquired by the grantor. And the cases of *M'Crackin* v. *Wright*, 14 Johns. Rep. 194, and *M'Williams* v. *Nisly*, 2 Serg. & Rawle, 515, are of the same character. We have not found any decided cases which contradict these, unless the case of *Davis* v. *Hayden et al.*, 9 Mass. Rep. 519, should be so considered. The deed from John Davis to his brother Edward of one seventh part of the land demanded in the action, was held to convey nothing, because at the time of making it the grantor had nothing in the land, being only heir apparent. The intention was to convey one seventh of what was supposed to be a vested remainder, Edward Davis the elder being in possession, having as was supposed a life estate only in the premises. The question of estoppel or rebutter was not presented in that case, nor does it appear by the state of facts reported that the deed of John to his brother Edward was with warranty; which is an essential feature in the doctrine established by the other cases.

We have before adverted to a distinction between a deed of land of which there is not any adverse possession at the time, and one which is given when the grantor is actually disseised and this fact known to the grantee at the time. In the latter case, by the policy of the law and in virtue of ancient Statutes, perhaps the deed would be wholly inoperative, both parties being transgressors in relation to such conveyance; but where the disseisin of the grantor is not known, which may be the case where the land granted is remote from the domicil of the parties, as no offence will have been committed, there seems to be no good reason why the contract between the parties should be defeated. And the history of our judicial proceedings will show that this distinction has been recognized, for there are numerous cases of grants by proprietors of land of which they were in fact disseised at the time of the grant; and in order to remove the disseisin, actions were brought in the name of the proprietors and recoveries had, after which the grantee has entered under his grant and maintained his title without any question in relation to subsequent disseisors; from which it is to be inferred that none but those who were in possession at the time when the grant was made, can avail themselves of the want of seisin of the grantor at the execution of the deed.

In the case before us there is nothing which would implicate the grantee in the offence of buying pretended titles. At the time of the execution of the deed by W. S. S. to Somes the intestate, it was believed that this was a proper form of conveyance to carry into effect a contract, which to all appearance was just and fair. Until then the legal title

was in Codman, as mortgagee, and the whole sum due on the mortgage was paid by the intestate, who if he had rested on his deed from Codman would have had an indisputable title to the whole of the tenement as security for his money. The mode unfortunately adopted let in J. S. the father under his deed, which had been legally supplanted by Codman's deed, so that it was only by this blunder J. S. the father could claim anything; and indeed he never seems to have asserted any claim during his life, living it is true on the premises, as did W. S. S., and probably well knowing the claim which Codman had as mortgagee. Justice requires that whatever came to W. S. S. through his father should now be enjoyed by Somes, and we are satisfied that the law will support this claim.

It was objected at the argument, that though this be the law, yet that under the declaration in which the demandant has counted upon an entire seisin of the whole estate, a judgment cannot be rendered for an undivided moiety. This objection appeared formidable when first stated, but having since had occasion to consider this question very deliberately in the case of *Dorcy* v. *Brown*, 2 Pick. 387, we came to the conclusion upon very satisfactory principles that the objection has no validity.

According to the agreement of the parties therefore in this case, the verdict is to be so altered as that the demandant shall recover seisin and possession of one undivided moiety of the premises described in the writ; and the judgment will be conditional, as in an action upon a mortgage.[1]

JACKSON *v.* BRADFORD.

SUPREME COURT OF NEW YORK. 1830.

[*Reported* 4 *Wend.* 619.]

THIS was an action of ejectment, tried at the New York Circuit in September, 1828, before the *Hon. Ogden Edwards*, one of the circuit judges.

A verdict was taken for the plaintiff, subject to the opinion of this court on the following facts, and if the court should be of opinion that the plaintiff was not entitled to recover, then judgment of nonsuit to be entered.

[1] When the grantor conveys "his right title and interest" by a quitclaim deed, meaning to pass only his present interest, there is no estoppel. *Comstock* v. *Smith*, 18 Pick. 116 (1832); *Wright* v. *Sewall*, 5 Cush. 56 (1849); *Miller* v. *Ewing*, 6 Cush. 34 (1850). So even though there be a covenant of warranty. *Hancock* v. *Patrick*, 119 U. S. 156 (1886). Rawle, Cov. (5th ed.) § 259.

Where the covenant for seisin is satisfied by a tortious seisin, as in Maine, Massachusetts, Ohio, Illinois, and Nebraska (see Rawle, Cov. § 42), such covenant does not pass after-acquired interests by estoppel. *Allen* v. *Sawyer*, 5 Greenl. 227 (1828).

Cf. *Chamberlain* v. *Wagner*, 18 Mo. 551, and see Rawle, Cov. § 252.

The property claimed consisted of two lots in the city of New York, an equal undivided fourth part of which came to William M. Price by *descent*, on the decease of his father on 21st May, 1821; previous to which time, to wit, on 4th December, 1818, a judgment was entered against Price in this court, which was revived in 1825, an execution issued, and the premises in question sold at sheriff's sale and purchased by the lessor of the plaintiff, to whom a sheriff's deed was duly executed, under which title the plaintiff claimed to recover.

On the part of the defendant was produced a deed bearing date 7th August, 1820, executed by William M. Price to the defendant, conveying the premises in question. The consideration of the deed was $2,500. By it Price "bargained, sold, remised, released and forever quitclaimed and confirmed" unto the defendant all the estate, right, title, interest, challenge, claim and demand whatsoever, both in law and equity of him the said Price, of, in, to or out of, all the right, title and interest *devised unto him by his father, Michael Price*, of, in and to the premises in question and other lots in the deed particularly mentioned; and also all the right, title and interest of, in and to the premises conveyed, *which should or might devolve upon or accrue to him at the death of his father*. After the *habendum*, followed this clause: "So that neither the said party of the first part, his heirs, executors or administrators shall not nor will at any time hereafter have, claim, challenge or demand any estate, right, title or interest either in law or equity of, in, to or out of the said premises abovementioned and described, or any part or parts, or parcel or parcels thereof by any ways or means whatsoever, but of and from all such estates, right, title, interest, and all other demands whatsoever of, in, to or out of the said premises above-mentioned and described, and every part and parcel thereof with the appurtenances shall and will forever hereafter be barred and utterly excluded by these presents." The defendant also produced in evidence an instrument in writing bearing date 8th May, 1821, executed by William M. Price, whereby, after reciting the above conveyance to the defendant, Price, in consideration of the sum before received and of the further sum of two dollars paid to him by the defendant, "bargained, sold, assigned, transferred and set over unto the defendant all the right, title and interest which he then had or which he might have at the death of his father in and to the premises in question, and the more effectually to secure the same to the defendant, he constituted and appointed him his attorney to ask, demand, sue for and recover the same.

S. A. Foot, for the plaintiff.

J. Bulkley and *J. Anthon*, for the defendant.

By the Court. (Marcy, J.) The judgment *eo instanti*, the property descended became a *lien* upon it, and the title to it vested in the purchaser at the sheriff's sale, unless the operation of the deeds to the defendant prevented it. When these deeds were executed, Price had no title or claim to the premises, and could therefore convey no right to them.

Qui non habet, ille non dat. A grant by a person who has no estate, as an heir in the life time of his ancestor, will not pass any estate. 3 Preston on Abstract of Titles, 25, 6. This position is well warranted by *Sir Marmaduke Wivel's Case*, Hob. 45. In that case a tenant in tail of an advowson, and his son and heir, joined in a grant of the next avoidance. The tenant in tail died, and it was held that the grant was utterly void against the son and heir who had joined in the grant, because he had nothing in the advowson, neither in possession nor right, nor in actual possibility, at the time of the grant. It is said in the Touchstone, 239, that a bare possibility of an interest which is uncertain is not grantable. The expectancy of an heir at law in the life of the ancestor (and such was the defendant's grantor in this case), is less than a possibility. *Wright* v. *Wright*, 1 Ves. sen. 409. Where a son releases in the life time of his father, the release is void, because, as Lord Coke says, he has no right at the time of making the release; all the right is in the father, and therefore, after the death of the father, the son may enter into the land against his own release. Co. Lit. 265 a.

It is very clear, both from reason and authority, that no title passes by the deed of an heir apparent or presumptive, to lands that may afterwards descend to him on the death of his ancestor; yet the heir may be barred by his deed from recovering such lands. Where the deed is by warranty, the warranty will rebut and bar the grantor and his heirs of a future right. This is not because a title ever passes by such a grant, but the principle of avoiding circuity of action interposes and stops the grantor from impeaching a title to the soundness of which he must answer on his warranty. Co. Lit. 265 a.

This estoppel, however, exists only where there is a covenant of warranty. It is contended on the part of the defendant that there is an estoppel in this case, and that it applies to the title set up by the plaintiff. There is no express warranty in either deed, nor anything that, in my judgment, is equivalent to a warranty. That which seems to be most confidently relied upon as making the requisite warranty, is the part of the first deed which immediately follows the *habendum*. The premises are to be held by the grantee, his heirs and assigns forever, "so that neither the grantor, his heirs, executors or administrators shall, at any time after the execution of the deed, challenge or demand any estate, right, title or interest therein, by any way or means whatsoever; but shall be forever barred and precluded from all right, title, interest or estate in the same." We are not called on to say what would be the effect of this clause in the deed under other circumstances; but only to inquire how it would affect the grantor on the supposition that the plaintiff should recover in this suit. If the plaintiff should succeed, could the defendant recover against his grantor for the breach of any express or implied covenant? The estoppel is on the principle of avoiding circuity of action; and if the grantor is not liable to an action, there can be no estoppel.

But if the grantor, by reason of his deed, be estopped from setting up title to the premises, does the estoppel apply to the title of the plaintiff? I apprehend it does not. An estoppel does not bind strangers. Co. Lit. 352 a. The plaintiff here is a stranger in respect to the matter that is alleged as the estoppel, — the deed. He is not a party to it; his title is in no way derived from it. He relies upon no act of the grantor, performed subsequent to the execution of the deeds, to give validity to his title. If the doctrine of estoppel does not apply to this case (and it appears to me quite evident that it does not), all difficulty is at once removed.

Judgment for plaintiff.[1]

KIMBALL *v.* BLAISDELL.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1831.

[*Reported* 5 *N. H.* 533.]

THIS was a writ of entry and was submitted to the decision of the court upon the following facts.

One John Brown, being seised of the demanded premises, on the 4th May, 1827, conveyed the same to Gordon Burley, who afterwards gave Brown a bond to re-convey the land upon the payment of $200.

On the 21st November, 1828, Brown conveyed the same premises to the demandant, with warranty against the claims of all persons claiming by, from, or under him the said Brown.

On the 29th April, 1829, the demandant having the bond given by Burley, as aforesaid, paid Burley $225, and took a deed of the land in the name of Brown. The demandant never had possession of the land.

After the 29th April, 1829, the tenant having notice of all the deeds above mentioned, and of the said bond, caused an execution, which he had obtained against Brown, to be extended upon the demanded premises. The tenant had no notice that the money paid to Burley was paid by the demandant.

Blaisdell, pro se.

Kimball and *J. Parker*, for the demandant.

RICHARDSON, C. J., delivered the opinion of the court.

John Brown had nothing in the land, when he conveyed to the demandant, and it is clear, that the demandant cannot recover in this action, unless he can avail himself of the title, which Brown subsequently acquired.

If the tenant had been apprised of the fact, that the money paid to Burley was the money of the demandant, and paid on his account, before he extended his execution upon the land, it would be a fraud in

[1] So, *accord.*, *Pike* v. *Galvin*, 29 Me. 183 (1848), — see dissenting opinion of Wells, J., 30 Me. 539. See *Bell* v. *Twilight*, 26 N. H. 401 (1853).

him now to claim the land against the demandant. The resulting trust would have constituted a good title to the land as against this tenant. 3 N. H. Rep. 170, *Seaby* v. *Blanchard*; 4 Ditto, 397, *Pritchard* v. *Brown*.

But it does not appear, that the tenant had notice of the trust in any way, and the demandant cannot recover on the ground that there was a resulting trust, of which the tenant had notice.

The only ground on which the demandant can now recover the land, is, that John Brown, and those claiming under him, are estopped by his deed to the demandant, to claim the land against the demandant.

We shall, in the first place, consider whether, John Brown himself is estopped by that deed to claim the land?

There are cases, in which an estoppel binds the land, and creates an estate and interest in it. If A. convey lands to which he has no title, to B., with warranty, any title which A. may subsequently acquire, will inure to the benefit of B., and A. cannot claim the land against his deed. 16 Johns. 110, *Jackson* v. *Stevens*; 13 Ditto, 316, *Same* v. *Same*; 1 Johns. Cases, 81, *Jackson* v. *Bull*; Plowden, 134; 9 Cranch. 53; Co. Lit. 47 b, and 265 a; 3 Pick. 52, *Somes* v. *Skinner*; 12 Johns. 201, *Jackson* v. *Murray*; 2 D. & E. 171; Com. Dig. "Estoppel," E. 10; 1 Starkie's Ev. 301; 5 Greenl. 227, *Allen* v. *Sayward*.

But it is otherwise, where one conveys by mere release, land to which he has no title. In that case, a title subsequently acquired by him will not inure to the benefit of him to whom he released. 1 Cowen, 613, *Jackson* v. *Hubble*; 14 Johns. 193, *Jackson* v. *Wright*.

In this case, the warranty of Brown was not general, but limited to any title to be derived from, by, or under him. But we are of opinion, that this warranty, under the circumstances of this case, has the same effect to create an estoppel, that it would have had, had it been a general warranty, and that if this suit had been against Brown, he would have been estopped to set up any title under the conveyance made by Burley to him.

The next question is, Whether this tenant is estopped to set up that title?

The general rule is, that all privies in blood, privies in estate, and privies in law, are bound by an estoppel. 1 Starkie's Ev. 305; 4 Peter's S. C. R. 84–88; 2 B. & A. 242, *Helps* v. *Hereford*; 3 D. & E. 371; 4 Coke, 53.

This tenant has the estate of Brown, if anything, and there is nothing stated in this case, to take it out of the operation of the general rule, and we are of opinion that the tenant is estopped to set up any title under Brown, and that there must be

Judgment for the demandant.[1]

[1] *See Bell* v. *Twilight*, 26 N. H. 401, 405–410.

BEDDOE *v.* WADSWORTH.

SUPREME COURT OF NEW YORK. 1839.

[*Reported* 21 *Wend.* 120.]

DEMURRER to declaration. This was an action on covenants of warranty and for quiet enjoyment, contained in a deed of land, dated July 7th, 1797, executed by the defendant to John Johnston. Each count (there being six in all) averred that afterwards, viz. on the same day, the defendant by Johnston's direction, and with his consent, surrendered *possession* of the land to the testator, John Beddoe, who *continued in possession* until Johnston, on the 16th August, 1802, by indenture, in consideration of *one dollar*, therein expressed as in hand paid by Beddoe, did "remise, release, and forever quitclaim unto the said John Beddoe, his heirs and assigns forever, all the right, title, interest, claim or demand, which the said John Johnston, &c., had in or to the said tract, &c., to have and to hold the said tract, &c., unto the said John Beddoe, his heirs and assigns forever, to his and their own proper use, benefit and behoof, &c." Each count stated an eviction from part of the premises, while in possession of persons claiming under John Beddoe, the plaintiff's testator, and during the lifetime of the testator. The eviction was alleged to have been in virtue of a title in one Rachel Malin. All the counts except the sixth stated this title to be paramount to the defendant's; and all except the *fifth* averred that the plaintiff, *as executor*, had thereby incurred damages and costs. The *fifth* count averred that the *testator* in his lifetime, and the *plaintiff* since his death, had been obliged to pay them.

The *first* and *second* counts averred that the defendant's deed to Johnston was given to and received by Johnston for and in behalf of Beddoe, the testator, and for his benefit.

All the counts except the third, concluded as for a breach of the covenant for *quiet enjoyment* only; the third was for a breach of the covenant of *warranty* only. But the deed as set forth in each count in fact contained covenants of seisin, of warranty, for quiet enjoyment, and further assurance. The defendant *demurred* to each count.

The demurrers were argued by

J. C. Spencer, for the defendant.

D. B. Prosser, for the plaintiff.

BY THE COURT. (COWEN, J.) If the covenants of warranty and for quiet enjoyment passed by the quitclaim deed from Johnston to the plaintiff's testator, the right of action sought to be shown by the declaration seems to be clear in all the counts except the sixth. This count is defective in not averring that the eviction was by a title paramount to that of the defendant. *Webb* v. *Alexander*, 7 Wendell, 281; *Luddington* v. *Pulver*, 6 Id. 404 to 406; *Greenby* v. *Wilcocks*, 2

Johns. R. 395; *Ellis* v. *Welch*, 6 Mass. Rep. 246; *per* Savage, C. J., in *Rickert* v. *Snyder*, 9 Wendell, 421, 422; 4 Kent's Com. 479, 3d ed. *Non constat* but Rachel Malin may have proceeded to eviction upon a right derived from Johnston or the testator himself. In the other five counts, however, there is enough to show that during the lifetime of Beddoe the testator, he either became personally liable on covenants to his grantees as to a part of the premises from which they were evicted by a title superior to the defendant's, or suffered an injury in an eviction of his tenant by a like superior title. Then it is averred either that the plaintiff was compelled to pay damages and costs as executor, or, according to the fifth count, the testator in his lifetime was obliged to pay a part, and the plaintiff another part after his death. In either case, the right of action pertained to the testator personally. The covenant was broken by the eviction, and the whole damages were due (Hosmer, C. J., in *Mitchell* v. *Warner*, 5 Conn. R. 504 to 506), the right to which passed on his death, not to his heir, but to his personal representative. *Hamilton* v. *Wilson*, 4 Johns. R. 72. A covenant real ceases to be such when broken, and no longer runs with the land. It would not go to the heir by death, for the same reason that it could no longer follow the land into the hands of a devisee or grantee. See *Markland* v. *Crump*, 1 Dev. & Bat. 94, 101; *Kingdon* v. *Nottle*, 1 Maule & Sel. 355; s. c. 4 Id. 53.

This view of the case disposes of all the minor objections raised by the demurrers. There must be judgment for the defendant on the sixth count, and for the plaintiff on all the others, unless either the first or second point taken by the defendant's counsel is sustainable. These are each applicable to the remaining five counts.

The first point is, that it appears from five of the counts, that when the defendant conveyed to Johnston, he, the defendant, had no title; and as no estate therefore passed to the plaintiff's testator, the covenants were not assigned; that covenants pass only as *incidents* to an estate; and if there be none, the covenants cannot be said to be annexed to an estate, much less to pass with it. The point seems to suppose that these covenants can never be transferred where there is a total want of right in the original covenantor, though his deed transfer the actual possession. It seizes on the phrase in 4 Kent's Com. 471, note b, 3d ed., and other books, "that they cannot be separated from the land and transferred without, but they go with the land as being *annexed to the estate*, and bind the parties in respect to *privity of estate*." No New York case was produced which denies that they pass where the *possession* merely goes from one to another by deed, and there is afterwards a total failure of title; but there are several to the contrary. *Withy* v. *Mumford*, 5 Cowen, 137; *Garlock* v. *Closs*, 5 Id. 143, n. And see *Markland* v. *Crump*, 1 Dev. & Bat. 94; *Booth* v. *Starr*, 1 Conn. R. 244, 248. Nor, when we take the word *estate* in its most comprehensive meaning, can it be said there is none in such a case to which the covenant may attach. It is said by Black-

stone to signify the condition or circumstance in which the owner stands with respect to his property (2 Black. Com. 103), and a mere naked possession is an imperfect degree of title, which may ripen into a fee by neglect of the real owner. Id. 195, 6. It is, in short, an inchoate ownership or *estate* with which the covenants run to secure it against a title paramount; and in that sense is assignable within the restriction insisted upon. It is said in several cases that the covenants of warranty and quiet enjoyment refer emphatically to the *possession* and not to the *title*. *Waldron* v. *M'Carty*, 3 Johns. R. 471, 3, *per* Spencer, J.; *Kortz* v. *Carpenter*, 5 Id. 120. The meaning is, that however defective the title may be, these covenants are not broken till the possession is disturbed. When the latter event transpires, an action lies to recover damages for the failure both of possession and title according to the extent of such failure.

The case of *Bartholomew* v. *Candee*, 4 Pick. 167, was mainly relied upon in support of the ground taken by the first point. All that case decides is, that a covenant no longer runs with the land after it is broken. The declaration was by the grantee of one Thorp, to whom the defendant had conveyed in fee with covenants of seisin and warranty; and breaches were assigned upon both. The defendant pleaded and the jury found, that before the defendant conveyed to Thorp, he had conveyed to one Sparks, who entered and died actually seised, leaving the land to his children, who were still actually seised when the defendant conveyed to Thorp. Mr. Justice Wilde arrives at the conclusion that the covenant of seisin was broken before the deed from Thorp to the plaintiff; and adds: "This point being established, it is perfectly well settled that no action will lie on this contract in the name of the assignee. By the breach of the covenant of *seisin*, an action accrued to the grantee, which, being a mere *chose in action*, was not assignable." He does not notice the covenant of *warranty*, but seems to consider the claim under that as standing on the same ground; which I think might well lie under the pleas as found by the jury. The fair import of these was, that neither Thorp nor the plaintiff ever had possession; so that, according to some cases, the covenant of warranty was also immediately broken; *Duvall* v. *Craig*, 2 Wheat. 45, 61, 62; *Randolph* v. *Meek*, Mart. & Yerg. 58; and according to our own it never could have any effect. No possession ever having been taken under the deed, there could be no actual eviction, which is said to be essential to a recovery upon a covenant of warranty. *Webb* v. *Alexander*, 7 Wendell, 281 to 284, and the cases there cited; *Jackson ex dem. Montressor* v. *Rice*, 3 Wendell, 180, 182, *per* Savage, C. J.; *Vanderkarr* v. *Vanderkarr*, 11 Johns. R. 122. See a very full collection and consideration of the cases to this point, both as it respects the covenant of warranty and for quiet enjoyment, by Hosmer, C. J., in *Mitchell* v. *Warner*, 5 Conn. R. 521 to 527. That an unbroken covenant of warranty shall run with the possession of the land, was not questioned by counsel or court in *Bartholomew* v.

Cundee, nor was it in a subsequent and similar case, *Wheelock* v. *Thayer*, 16 Pick. 68, also relied upon. I have looked through the other cases cited by the counsel for the defendant, and they all go to the point, either that a covenant broken ceases to be assignable, or that covenants in gross are not so. These positions are indisputably settled; and we have adopted the first, in order to show that this action was properly brought by John Beddoe's executor instead of his heir. I do not except from this remark the case of *Andrew* v. *Peirce*, 4 Bos. & Pull. 158. It is true that was an action on covenants both that the defendant had authority to demise and for quiet enjoyment. The title failed before the plaintiff took an assignment; he entered and was ousted; and it was held that he could not recover, because the mere failure of the title broke the covenants. Mansfield, C. J., said expressly, the assignor had only a right of action left, which he could not assign. It would seem by this case that in England a simple failure of title, without eviction, would be a breach of the covenant for quiet enjoyment. With us the doctrine is clearly otherwise. *Kortz* v. *Carpenter*, 5 Johns. R. 120; *Norman* v. *Wells*, 17 Wendell, 160, and the cases there cited; and see *Mitchell* v. *Warner*, 5 Conn. R. 497, 522, and the very full reference there to the New York cases. In *Andrew* v. *Peirce*, the lease was treated as totally gone, by a failure of the title; whereas there was still a continuing possession, till the plaintiff was ousted, and then and not till then, according to our cases, was the covenant for quiet enjoyment broken. There is a difference in more respects than one between our own and the English cases as to what shall constitute a breach of the covenants of title, so as to take away their assignable quality. Even a covenant of seisin, made and broken in the same breath, is there held to run with the land, till actual damages are sustained by the breach. *Kingdon* v. *Nottle*, 1 Maule & Sel. 355; 4 Id. 53. Kent's Com. 471, 2, 3d ed., says the reason assigned for the decision is too refined to be sound. The case is followed by *Backus' Admr.* v. *McCoy*, 3 Ham. Ohio R. 211; but severely criticised in *Mitchell* v. *Warner*, 5 Conn. R. 497 to 505. Kent's Com. *ut supra*, note a.

But secondly, if the covenant be in its own nature available to the assignee as a protection against the total failure of the defendant's title, and if it be assignable by a grant of the land, it is insisted that none of the counts in the declaration show that such a grant was made from Johnston to the plaintiff's testator. All the counts stop with averring that Johnston, for the consideration of one dollar, *remised, released and forever quitclaimed* to the testator in fee. Technically, these are but words of release; and as no previous lease from Johnston to the testator is shown, it is supposed that the granting words are inoperative. This objection supposes that the words used cannot carry the estate except as part of a conveyance by lease and release; and that, in order to give them effect, a lease should be shown, either by its production and proof, in the usual way, or its recital in the release:

and this formal strictness would seem still to prevail in England. *Doe ex dem. Pember* v. *Wagstaff*, 7 Carr. & Payne, 477. In *Bennet* v. *Irwin*, 3 Johns. R. 365, 366, Van Ness, J., said, a mere release or quitclaim, unless the releasee is in possession, is void. But the declaration, in the case at bar, shows that the grantee was in possession. Even this strictness was, however, totally exploded, by the case of *Jackson ex dem. Salisbury* v. *Fish*, 10 Johns. R. 456, the operative words as set forth in the declaration being held of themselves sufficient to raise and execute a use under the Statute. The conveyance was there held good as a bargain and sale. Had that case occurred to counsel, we should doubtless have been saved the examination of this objection; for we do not remember its being denied on the argument that words which are sufficient to pass a fee in conveyancing are equally sufficient in pleading by way of averment.

The demurrers are overruled as to all the counts except the sixth, and judgment must be given for the plaintiff.

The demurrer to the sixth count is well taken, and judgment must be given for the defendant as to that count, with leave to both parties to amend.

SLATER *v.* RAWSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[*Reported* 1 *Met.* 450.]

DEWEY, J.[1] This is an action to recover damages for the breach of certain covenants in a conveyance of land made by the defendant to Samuel Slater and John Tyson, through whom, by sundry conveyances, the plaintiffs derive their title as assignees and subsequent purchasers. The covenants in the deed of the defendant are in the usual form, embracing the covenants of seisin and right to convey, a covenant against encumbrances, and also a covenant of warranty. The breach alleged in the declaration is, that one Elisha Jacobs, having an elder and better title than that of the defendant, entered upon the land, claiming title thereto, and that the plaintiffs, admitting his superior title, voluntarily surrendered the possession to him. To establish the title of Jacobs, the plaintiffs offered in evidence a deed from one John Rawson to William Sears, dated May 6th, 1782, and sundry other deeds conveying this title, as derived from Sears, and vesting it in Jacobs. The defendant admitted that the deed from John Rawson was prior in time, to that under which he claimed to have acquired title; but he contended that the deed of Rawson to Sears did not include the land which the plaintiffs had thus voluntarily surrendered

[1] The opinion only is given.

to Jacobs. This presented a question of boundary, and much evidence thereon was submitted to the jury.[1]

The only other question, upon which any opinion in matter of law was given at the trial before the jury, was upon the subject of damages. The jury were directed, if they should find for the plaintiffs, to assess the damages at the value of the land at the time of the voluntary surrender of it by the plaintiffs upon the entry by Jacobs, with interest from that time; and this, as we understand, is not denied by the defendant's counsel to be the correct rule for assessing the damages, if the plaintiffs can maintain their action. But upon the argument before us, upon the case as stated by the parties, the defendant insists, that as he was not seised of the land, which is now the subject of controversy, at the time he executed the deed to Slater and Tyson, and so nothing passed by his deed to his immediate grantees, and they therefore could pass no estate, nor any covenants, to an assignee, which would authorize an action in his own name, he is not liable to the plaintiffs, to any extent, on his covenants.

The distinction as to the legal effect of the different covenants usually introduced into our conveyances, however little it may have been understood or regarded prior to the cases of *Marston* v. *Hobbs*, 2 Mass. 433, and *Bickford* v. *Page*, 2 Mass. 455, is now very well settled. The covenants of seisin and right to convey are to all practical purposes synonymous covenants; the same fact, viz. the seisin in fact of the grantor, claiming the right to the premises, will authorize both covenants, and the want of it is a breach of both. But upon these covenants no action can be maintained in the name of an assignee or subsequent purchaser; for if broken at all, they are necessarily broken at the moment of the execution of the deed; and not running with the land, they do not pass by a subsequent conveyance of the land. The covenant of warranty, on the other hand, is a covenant running with the land, and may be made available to a subsequent purchaser, however remote, if the conveyances are taken with proper words to pass the covenant. But to support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seised of the land; for, by a conveyance without such seisin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach. If therefore the defendant, at the time of the making of his deed to Slater and Tyson, was not seised, then the covenant of warranty did not pass to the plaintiffs as assignees, and the only liability of the defendant is upon his covenant of seisin, which covenant, for the reasons already stated, is wholly unavailable to the plaintiffs.

It is to be taken as established by the finding of the jury, and is also in accordance with the pleadings on the part of the plaintiff, that the defendant, at the time of making his conveyance, had no legal title to

[1] The part of the opinion relating to the question of boundary is omitted.

the twenty-two acres of land, which the plaintiff has yielded up to the claim of Jacobs; but that the title to the same was then, and had been for a long period previously, in William Sears and those claiming under him. The further inquiry then is, whether the defendant was seised in fact of these premises, claiming right thereto, at the time of executing his deed to Slater and Tyson.

The case, as stated by the parties, in the report, finds that the premises, which are the subject of this controversy, were a part of a large tract of woodland unenclosed by fences, and of which there had been no actual occupation by any of the parties. Taking these facts to be correctly stated, there was clearly no seisin in fact, in the defendant, acquired by an entry and adverse possession. The rule, as to lands that are vacant and unoccupied, that the legal seisin follows the title, seems to be applicable here; and having ascertained in whom is the legal title, that also determines in whom the seisin is. But the plaintiffs have alleged in their declaration, and established by their evidence, the fact that the legal title to the land surrendered was not in the defendant at the time of the execution of the deed by him, but was in those who claim under William Sears. It being thus shown that there was no seisin in fact, nor any legal title to the premises, in the defendant, it necessarily follows that the covenants of seisin and right to convey were broken, and that nothing passed to Slater and Tyson, which they could transfer to the plaintiffs as the foundation of an action in their own name. The covenant of seisin was broken at the moment of the execution of the deed, and became a mere chose in action not transferable; and the covenant of warranty is wholly ineffectual, as no land passed to which it could be annexed; and the result, therefore, from this view of the case, is that the plaintiff cannot maintain his action.

It was said in the argument, that the defendant should be estopped to deny his seisin, and thus avoid the covenant of warranty, because by his own deed he has affirmed it, and that should be conclusive against him. Without deciding whether such estoppel might or might not, under any circumstances, be interposed where there are various covenants in a deed, and the party be thus subjected, at the election of the covenantee, to damages different from those which the law has prescribed for the covenant which is actually broken; or, in the case of an assignee, to allow him to recover for the breach of a covenant which is shown in fact never to have passed to him; it seems to us clear, that in the present case no such objection can avail, as the plaintiff, in his declaration, and by his own showing, has established the fact that the defendant had neither the seisin nor the legal title to the land conveyed.

It was further suggested, upon the argument, that the ground of defence now principally relied on, that the covenant of warranty did not pass to the plaintiffs, in consequence of the want of seisin in the defendant, is not open to the party; not having been presented in this

form at the trial before the jury. As a general rule, questions must be raised at the trial, or they will not be open here: and for the very obvious reason, that the opposite party may have the proper opportunity to supply any defects in his proof upon the points excepted to. But as, in the present case, the facts, as stated in the report, and as they appear to be conceded by both parties, show the objection, now urged and relied upon in defence, to be one that could not be obviated by any further proof on the part of the plaintiff, the court have felt themselves authorized to consider that point as open, and have disposed of it in the manner already stated. The result is, therefore, that upon the case as now stated, the plaintiff cannot maintain his action.

New trial ordered.[1]

Washburn, for the defendant.

C. Allen, for the plaintiffs.

BAXTER *v.* BRADBURY.

SUPREME JUDICIAL COURT OF MAINE. 1841.

[*Reported* 20 *Me.* 260.]

COVENANT broken, for breach of the covenant of seisin in a deed of warranty from the defendant to the plaintiff, dated August 3d, 1835. In this deed many lots of land were conveyed, and several in Corinth were described. To prove the breach of the covenant declared on, the plaintiff read a deed of warranty from John Peck to Benjamin Joy, conveying the town of Corinth, with certain reservations, dated July 27th, 1799. The land in controversy was part of the land conveyed to Joy. The plaintiff proved the consideration paid for these lots, and there rested his case.

The defendant then read a deed of mortgage, dated August 3d, 1835, from the plaintiff to him, of the same premises to secure the payment of certain notes; and a deed of quitclaim of the same premises from the plaintiff to Chester Baxter, dated July 31, 1837. To prove a seisin in the plaintiff, and also for the purpose of reducing the damages, the defendant offered in evidence a deed of quitclaim from Amos Whitney to him of one of the lots, dated August 24, 1835, and the warranty deed of Thomas Whitten, dated the same day, of another lot, and offered evidence to show that the grantors were then in possession. To the introduction of this evidence the plaintiff objected, and *Emery*, J., presiding at the trial, ruled it to be inadmissible, and rejected it. The defendant also offered the contract of Joy, dated in June, 1835, to convey certain of the lands in contro-

[1] On the new trial, the case was saved for the consideration of the full court, and it was *held*, that, the defendant being proved to have been in possession of the land at the time of his deed to Samuel Slater and John Tyson, his covenant ran with the land to their assignees. S. C. 6 Met. 139.

versy to the defendant, and a deed of the same from the heirs of Joy, dated Oct. 20, 1837, after this action was commenced, but the judge rejected it. The defendant then offered to prove that the lots were of less value than the purchase-money. This evidence was rejected.

A default was then entered by consent, and the damages assessed at the amount of the consideration and interest, under an agreement, that if in the opinion of the whole court, the evidence rejected should have been admitted, the default was to be taken off, and the action stand for trial.

J. Appleton, for the defendant.

Rogers and *Cooley*, for the plaintiff.

The opinion of the court was by

Weston, C. J. It is assumed in argument that Amos Whitney and Thomas Whitten were seised of the lands described in their respective deeds to the defendant, dated August 24, 1835. The lands constitute a part of that, which is the subject-matter of this suit. These deeds, with the evidence of their seisin, were rejected as inadmissible, by the presiding judge at the trial. If this evidence could legally have any effect upon the right of the plaintiff to recover, or upon the measure of damages, it ought not to have been rejected.

The rules, which have been established to determine the measure of damages, upon the breach of covenants in deeds for the conveyance of real estate, have been framed with a view to give the party entitled a fair indemnity for damage he has sustained. Thus if the covenant of seisin is broken, as thereby the title wholly fails, the law restores to the purchaser, the consideration paid, which is the agreed value of the land, with interest. But in this, as well as in other covenants, usual in the conveyance of real estate, if there exists facts and circumstances, which would render the application of the rule inequitable, they are to be taken into consideration by a jury. *Leland* v. *Stone*, 10 Mass. R. 459. The covenant was intended to secure to the plaintiff a legal seisin in the land conveyed. If it is broken and he fails of that seisin, he has a right to reclaim the purchase-money. But if in virtue of another covenant in the same deed, which was also taken to assure to him the subject-matter of the conveyance, he has obtained that seisin, it would be altogether inequitable that he should have the seisin, and be allowed besides to recover back the consideration paid for it. The rule as to the measure of damages for the breach of this covenant, which is just in its general application, could never be intended to apply to such a case. In *Whiting* v. *Davey*, 15 Pick. 428, it is strongly intimated by the court, that this rule may have exceptions, as it undoubtedly has.

If Whitney and Whitten were seised, immediately upon the execution of their deeds, which were executed a few days after that, upon which the plaintiff declares, their seisin at once inured and passed to him, in virtue of the covenant of general warranty in his deed. *Somes* v. *Skinner*, 3 Pick. 52. It has been insisted by the counsel for the

plaintiff that this effect depends upon the election of the grantee, and that the plaintiff here would reject the title arising by estoppel. But we are aware of no legal principle, which can sustain this position. In the case last cited, the court say, "that the general principle to be deduced from all the authorities is, that an instrument, which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor." The plaintiff by taking a general covenant of warranty, not only assented to, but secured and made available to himself, all the legal consequences, resulting from that covenant. Having therefore under his deed, before the commencement of the action, acquired the seisin, which it was the object of both covenants to secure, he could be entitled only to nominal damages, and in our judgment the evidence rejected was legally admissible. The estoppel, being part of the title, may be given in evidence, without being pleaded. *Adams* v. *Barnes*, 17 Mass. R. 365. Whether the seisin of Whitney and Whitten was defeasible or indefeasible, is not a question which can arise under this covenant, which operates only upon the actual seisin and does not assure the paramount title

The same course of reasoning, and the same authorities, which justified the admission of the testimony rejected, required that the evidence of title derived by estoppel from Joy's heirs, should have been received.

It has been objected, that these lands may have been devised by Joy, which may have prevented a descent to the heirs. But an estate in fee, upon the decease of the ancestor, is presumed to descend, in pursuance of the laws of inheritance, unless the descent is shown to have been intercepted by a devise. By the conveyance from Joy's heirs to the defendant, the plaintiff acquired not only the seisin, but an indefeasible title. As, however, that was executed, since the commencement of the action, the plaintiff is entitled to nominal damages, and to nothing more, if he has not been disturbed in his possession; and judgment may be rendered for him therefor on the default, which has been entered. But if the actual seisin of Whitney and Whitten is intended to be contested, or the plaintiff would show that he had been dispossessed, before his title by estoppel attached, the default must be taken off, and the action stand for trial.

TRULL *v.* EASTMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported* 3 *Met.* 121.]

THIS was a real action, submitted to the court on the following statement of facts: David Trull, the demandant's father, on the 10th of April, 1819, being seised of the demanded premises in fee, made his last will, wherein he devised and bequeathed his real and personal property to his two sons, John Trull (the demandant), and Phinehas Trull, making the real estate subject to the payment of certain legacies. It was at that time agreed (in consideration of the expectancy under the will) between said David, John, and Phinehas, that John and Phinehas should work upon and carry on the farm, and support said David and his wife during their lives. In March, 1823, John and Phinehas, with the knowledge and consent of said David, orally agreed to refer to two persons, to decide what sum should be paid to John by Phinehas for all John's right in any real or personal estate of said David in expectancy. The referees thereupon examined said real and personal estate, and the will of said David, and awarded that Phinehas should pay to John $613; and in consideration of a promissory note given by Phinehas to John for that sum, John duly executed a deed to Phinehas, with the knowledge and consent of said David, by which he remised, released and forever quitclaimed all the right, title, or interest which he had or might have in or unto the estate of his father, David Trull, whether the same might fall to him (John) by will or heirship, or whether the same might be real or personal estate: including all the property of every description, name and nature, that might be given to him by the last will of said David Trull, or that might fall to said John by heirship from the estate of said David, wherever the same might be found.

The *habendum*, &c., of this deed were in these terms: "To have and to hold the afore-mentioned premises, with all the privileges and appurtenances thereunto belonging, to him the said Phinehas Trull, and to his heirs and assigns forever; so that neither I, the said John Trull, nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right or stead of me or them, shall or will, by any way or means, have, claim or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof, forever."

Immediately after the giving of the deed aforesaid, said John removed from the demanded premises. In 1825, said David died seised of the same premises, and his will aforesaid was duly proved and allowed by the Court of Probate. The aforesaid note was paid by said Phinehas to the demandant, according to its tenor.

The said Phinehas, having intermarried with Abigail, who is now one of the tenants, and the wife of the other tenant, died on the 20th of August, 1831, leaving said Abigail, his widow, and one daughter of said marriage, who died, at the age of two years, on the 10th of November following. The tenants, Stephen and Abigail, intermarried in 1833.

The said John and Phinehas resided and worked upon their father's farm, from the time of the making of his will, until the date of the deed aforesaid given to Phinehas; and John had a family living there with him for several years before the last date. Phinehas remained and worked on said farm till the death of his father, and was thereafter in the occupation and possession thereof until his own death. Since his death, the farm has continued in the possession of the tenants and of those under whom the tenants claim from him.

Demandant to become nonsuit, or tenants to be defaulted, as the court shall direct.

B. Rand, for the demandant.

Hopkinson, for the tenants.

PUTNAM, J. The demandant seeks, by a recovery in this action, to defeat a family arrangement, made by him and his brother Phinehas, now deceased, with the consent and knowledge of their father. And in this respect this case is like that of *Fitch* v. *Fitch*, 8 Pick. 480, wherein it was held, that a covenant by an heir expectant that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without any advantage being taken of the covenantor.

In the case at bar, the agreement between the brothers, John and Phinehas, was made upon a good and legal consideration. The price, which Phinehas was to pay to John for his right in expectancy to his father's estate, was ascertained by disinterested referees; and the money was paid to and received by the demandant accordingly: Whereupon the deed, mentioned in the statement of facts, was made by the demandant to Phinehas. The tenants have the same right to the estate which Phinehas had, and which he could have and maintain if he were living. And the question upon the whole matter is, whether the demandant is by law entitled to recover. It has been contended for him, that no estate passed from him by his deed to his brother: That it was a mere expectancy, and that the deed could operate on the realty only to convey the present right; and that the covenant should be restrained or limited in such manner, as that the grantor, and those under him, should not claim any part of the estate thereafter, which he *then had*; but that he should be permitted to acquire, by grant or devise, any right to the estate thereafterwards, to his own use. And if that were the true construction of the deed, the consequences would follow. It may be conceded that the covenant should be limited to the premises — the subject matter of the conveyance. And it is perfectly clear, that the premises in that deed embraced what right the

grantor should thereafterwards acquire, as well as what present right he had.

It is well settled, that if the heir releases with warranty, it bars him when the right descends. In Co. Lit. 265 a, the law is clearly laid down. "If there be a warranty annexed to the release, then the son" (who released living the father) "shall be barred. For albeit the release cannot bar the right, for the cause aforesaid" (viz., that the releasor had no present interest), "yet the warranty may rebut and bar him and his heirs of a future right which was not in him at that time." See also Fitzg. 235.

Now the covenant, in the case before us, was in effect a covenant real. The law does not require any particular form of words to constitute such a covenant, which shall run with the land. In *Fairbanks* v. *Williamson*, 7 Greenl. 96, it was held, that a covenant that neither the grantor nor his heirs should make any claim to the land conveyed, was a covenant real, which ran with the land. In effect it is a warranty, that the grantor will not, and that his heirs and assigns shall not, thereafterwards claim the premises granted or released, or any part of the same. And although the grantor or releasor had not then a present right, yet the subsequent acquisition of it shall inure to the use of the grantee; or, in the better words of Lord Coke, the grantor shall be rebutted and barred, when he afterwards shall so claim against his own warranty. There is nothing to the contrary in the case of *Comstock* v. *Smith*, 13 Pick. 116, cited by the demandant's counsel. The grantors, in that case, conveyed all their right, title and demand in the premises, with warranty against all persons claiming by, from or under them, and not otherwise. The court construed that to be a conveyance of the interest and right which the grantors then had; and of course that it should not conclude them from subsequently purchasing or acquiring a title to the same estate. But, in the case at bar, the deed from the demandant to his brother expressly embraced future rights to be acquired. Indeed, those rights were the substantial matter relating to which the deed and the covenant were made.

Demandant nonsuit.[1]

BLANCHARD *v.* ELLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1854.

[*Reported* 1 *Gray*, 195.]

ACTION of contract on the covenant against encumbrances, contained in a deed from the defendants to the plaintiff, dated the 9th of November, 1838, purporting to be made in consideration of the sum of $5,520, and to convey "one undivided quarter part of the east half of

[1] See note to *Somes* v. *Skinner*, p. 758, *ante*.

township numbered three in the eighth range of townships in the County of Penobscot and State of Maine," with the usual covenants of warranty. The declaration set forth the execution and delivery of the deed; and then alleged that, at the date of the execution thereof, the land therein described was not free from encumbrances, but was under an attachment, made on the 18th of February, 1836, in an action brought by Wiggins Hill against James T. Hobart, then owner of the premises, and from whom the defendants derived their title; that in said action Hill, on the 6th of November, 1838, recovered judgment for the sum of $52,755.39; and on said judgment execution issued, and was duly levied upon said land on the 25th of December, 1838; and seisin and possession of said land was delivered to Hill, the judgment creditor, and received by him. Writ dated October 18th, 1851.

At the trial before *Bigelow*, J., there was evidence tending to prove the facts stated in the declaration, and also the following facts: The amount of the execution was much greater than the value of the land levied upon, which was the whole of the east half of the township, of which the land conveyed to the plaintiff constituted an undivided quarter part; and by virtue of the levy the title to the east half of said township became absolutely vested in Hill in one year from the date of the levy; and he continued in possession of the land levied upon until the 4th of December, 1848, when he made a deed to the defendants of the portion included in their deed to the plaintiff, expressed to be in consideration of $1,100, and with the usual covenants of warranty. In February, 1841, the defendants gave notice to the plaintiff of this failure of title, and offered to transfer to him certain stock by way of indemnity for his loss. During the time that Hill remained in possession of said half township, he received the sum of four hundred dollars net for stumpage. The plaintiff offered no evidence, beyond what has already been stated, to show that the premises were more or less valuable than at the date of the deed from the defendants to him; or that anything had been realized or received therefrom, except said stumpage.

The case was taken from the jury by consent of parties, and reserved for the consideration of the full court, with the agreement that if the court should be of opinion, upon the foregoing facts, that the plaintiff was entitled to recover nominal damages only, judgment should be rendered in his favor for one dollar; to which should be added the sum of one hundred dollars, if the court should be of opinion that the plaintiff was entitled to any part of the stumpage received by Hill; and that if the court should be of opinion that the plaintiff was entitled to recover any other or further damages, the case should be sent to a jury for trial and for the assessment of such damages, on principles to be determined by the court.

W. H. L. Smith, for the plaintiff.

C. M. Ellis, for the defendants.

THOMAS, J. It is not doubted that the facts of this case establish a breach of the defendants' covenant; but the question at issue between the parties is as to the measure of damages.

The defendants say, that a deed of the premises having been made to them by Hill, on the 4th of December, 1848, the title so conveyed to them inured, by way of estoppel, to the plaintiff, and is now in him, and that the only damages he can recover are nominal, or his quarter of the stumpage of the entire tract; such stumpage constituting the only rents and profits of the estate during the eviction of the plaintiff, or the difference, if any, between the value of the land at the time of the conveyance by the defendants to the plaintiff, and its value at the time of the conveyance by Hill to the defendants.

The general doctrine, on which the defendants rely, is quite familiar; that if A., having no title, make a deed of land to B., with full covenants of warranty, and A. subsequently acquire a title by descent or purchase, he is estopped by his covenants, as against his grantee, to deny that he had a good title at the time of his grant, and such new title is said to inure to his grantee. Strictly speaking, there would seem to be no transmutation of estate when the new title comes to the grantor. Nor is there any force in the original deed to convey a title not then existing in the grantor; for nothing can pass but his then existing title. But the grantor and those claiming under him are estopped to deny the validity of the title, which he has solemnly asserted, and to set up a title against it. The law presumes that he has spoken and acted according to the truth of the case, and will not permit him or those claiming under him to deny it. "The reasons," says Mr. Butler, in a note to Co. Lit. 352 a, "why estoppels are allowed, seem to be these: No man ought to allege anything but the truth for his defence, and what he has alleged once is to be presumed true, and therefore he ought not to contradict it; for, as it is said in the 4 Inst. 272, *allegans contraria non est audiendus*." It might be curious to trace the progress of this doctrine of estoppel, as applicable to the covenant of warranty, from the simple rebutter of Lord Coke (Co. Lit. 265 a), which should bar a future right, to avoid a circuity of action, to its present condition, in which there is claimed for it the full force of a feoffment, or fine or common recovery at the common law; that is, having the function of actually devesting the feoffor or conusor of any estate which he might thereafter acquire. But waiving, because not necessary to our purpose, the discussion of the origin and extent of the doctrine of estoppel, it will be sufficient to say that we do not feel called upon to extend its application; especially when such extension would tend to defeat the principle on which the doctrine of estoppel rests, which is the prevention of wrong and injustice.

Supposing it to be well settled that, if a new title come to the grantor before the eviction of his grantee, it would inure to the grantee, and not deciding, because the case does not require it, whether the grantee, even after eviction, might elect to take such new title, and

the grantor be estopped to deny it; we place the decision of this case on this precise ground, that where a deed of land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against encumbrances, or in mitigation of damages for the breach of it.

We do not seek a better illustration of the soundness of this principle than is furnished by the facts of this case. The land, for which the consideration stated in the deed was $5,520, was under attachment in a suit in which judgment had been recovered for more than fifty thousand dollars; the entire tract, of which one quarter had been conveyed to the plaintiff, was afterwards levied upon, seisin given to the creditor, and the plaintiff wholly evicted. He had no estate or interest left. The covenant against encumbrances being personal, and not running with the land, he had nothing which could pass by deed. He could not redeem his undivided quarter, without a redemption of the entire estate. He could not, for a period of ten years, enter upon the land, without committing a trespass. The defendants admit the existence of the title paramount, and the eviction of the plaintiff; but contend, after the eviction has continued ten years, that they, as grantors, may avail themselves of this rule of estoppel, to force the grantee to take the estate, however changed the situation of his own affairs, or the condition of the land. So that the equitable rule of estoppel, which forbids the grantor to deny that he had the estate which he had assumed to grant, and the truth of his own covenant — a rule established for the protection of the grantee, and to be applied only to effect justice and prevent wrong — is converted into a right of election in the grantor, upon a breach of his covenant, to pay back the consideration money, or by indirection to reconvey the estate. We say an election by the grantor; for it is clear that the grantee cannot compel the grantor to buy in the paramount title, but must rely solely upon his covenants. It is equally clear that, if the estate, during the eviction, should greatly increase in value, the grantor would not be likely to purchase such paramount title, but would submit to an action on his covenants. So that, under any rule of damages suggested, the plaintiff would lose many of the advantages resulting from the ownership of land, including the increase of value by the application of his own labor or capital, or its rise in the market. There is neither mutuality nor equity in such a rule.

And we are satisfied, upon examination of the authorities, that no case will be found which carries the doctrine of estoppel to the length claimed by the defendants, which in fact estops the grantee, and leaves a right of election in the grantor. The case of *Baxter* v. *Bradbury*, 20 Maine, 260, has been strongly pressed upon us as a decision of the very question at issue. If this were so, the question having reference to

the title to land in that State, the decision, on that ground, as well from our respect for that court, would be entitled to the highest consideration, if indeed it were not conclusive. But, though there are *dicta* in that case, which state the doctrine very broadly, the case itself differs materially from the one at bar. That was an action for a breach of the covenant of seisin in a deed of warranty, with a mortgage back of the premises, of the same date, to the grantor. The ground, taken by the counsel of the defendant, and upon which the court seem to have proceeded in their judgment, was, that there never had been any interruption of the possession of the plaintiff. In seeking to deduce from that case a rule for our guidance, this circumstance must be deemed most material; as, for a breach of this covenant against encumbrances, nominal damages only could be recovered, unless the plaintiff had been evicted by title paramount, or had actually discharged the encumbrance.

The court, in the case of *Baxter* v. *Bradbury*, refer to a statement of the result of the authorities by the late Chief Justice Parker in the case of *Somes* v. *Skinner*, 3 Pick. 52. An examination of the whole opinion in that case would lead us to infer that this statement was not made without some misgiving and distrust. The precise question now under consideration was not before the court, and what in that part of the case was decided was, that where a title has inured by estoppel, it will avail the grantee, not only against the grantor and his heirs, but strangers, who usurp possession without right; and under the facts of the case, and in the view in which it was applied, there is no occasion to reconsider the rule there stated.

The case of *Cornell* v. *Jackson*, 3 Cush. 506, was an action upon the covenant of seisin. An action had before been brought upon the covenant of warranty, in which there was a judgment for the defendant. 9 Met. 150. The defendant had conveyed land to the plaintiff, bounded on land of Tuckerman; a conventional line had been fixed by parol agreement between the defendant and Tuckerman; and they had occupied according to that conventional line; but the court, in the action on the covenant of warranty, held that the true line, and not the conventional line, was the boundary referred to in the defendant's deed. An action was then brought on the covenant of seisin; and the possession of land by Tuckerman, between the true line and the conventional line, being under a claim of title, was held to be a breach of the covenant of seisin. In the assessment of damages, it appeared that a portion of the land had been recovered by the defendant of the heirs of Tuckerman; and the report of the assessor submitted the question, whether the value of the land so recovered should be included in his assessment. The court said: "If, by any means, the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages *pro tanto*." In that case the title was in the grantor at the time of the deed, and he might have made a valid conveyance but for the disseisin; and what the court decided was, that

if he subsequently regained the seisin, and the land was restored to the grantee, it would proportionally reduce his damages.

Upon examination of the authorities, we think no decision will be found to be in conflict with the point now decided, or which leads to the result claimed by the defence. There are *dicta* which, taken out from their connection with the facts, in relation to which they are made, and by which their soundness must always be tested, might tend to a different conclusion; but no precedent has so extended the doctrine of estoppel, and we do not feel willing to make one.

The question of course arises, How will the defendants, the grantors, be protected? Will they not be still estopped to deny the title of the plaintiff, if he should bring his writ of entry for the land? The answer is, that the judgment in this suit will be a perfect bar to the plaintiff and those claiming under him. *Porter* v. *Hill*, 9 Mass. 34.

With regard to the rule of damages, there can be no serious controversy, if the plaintiff has gained no title by estoppel; the plaintiff will be entitled to the consideration money and interest. The consideration expressed in the deed is *prima facie* the true one, but liable to be controverted by evidence.

The case must be sent to a jury to ascertain the damages under this rule.[1]

BUSH *v.* COOPER.

SUPREME COURT OF THE UNITED STATES. 1855.

[*Reported* 18 *How.* 82.]

MR. JUSTICE CURTIS delivered the opinion of the court.[2]

A bill to foreclose a mortgage on a lot of land in Mississippi was filed by the administrator of the assignee of the mortgage, in the Superior Court of Chancery in that State. The complainant obtained a decree of foreclosure, and the respondent appealed to the High Court of Errors and Appeals, where the decree of the Superior Court of Chancery was affirmed. The appellant then prosecuted the writ of error, which brings the case before this court.

The case was, shortly, this: The appellant was one of two mortgagors. When the mortgage was executed, the land was encumbered by a lien from a judgment previously recovered against the mortgagors.

After executing the mortgage the appellant became a bankrupt, under the Act of Congress of August 19, 1841, 5 Stats. at Large, 440, and received his discharge. The land was exposed to sale to satisfy the judgment lien, and the appellant, after his discharge, purchased it. The Court of Appeals of Mississippi decided: —

1. That though the deed of mortgage contained no express cove-

[1] *Ross* v. *Smith*, 12 Me. 344 (1849), *contra*. See Rawle, Cov. § 258.

[2] The opinion only is given.

nant of warranty, the words "grant, bargain and sell," which were in the deed, under the law of that State, imported covenants of warranty of title, and against encumbrances, and for quiet enjoyment, as effectually as though such covenants had been expressly set out in the deed.

2. That, under the law of Mississippi, if there had been no discharge in bankruptcy, the appellant would be estopped by his covenants from setting up his after-acquired title to defeat the mortgage.

3. That the discharge in bankruptcy did not enable him to do so.

This last position is the only one re-examinable here; the decision by the State court, of all matters depending exclusively upon the law of the State, being conclusive, on a writ of error, under the 25th section of the Judiciary Act of 1789.

The question for our consideration is, what effect the discharge of a bankrupt has upon estoppels, arising by law from covenants of warranty contained in his deeds of conveyance of land.

To determine this, it is necessary to have in view the different modes of operation of such covenants. They are contracts, and an action lies for recovery of the damages sustained by their breach. At law, they run with the land; and if the covenantor subsequently acquire an outstanding paramount title, it inures by force of the covenant to him who claims under the deed of the covenantor. This rule is now established in the law of this country, and has been affirmed in numerous decisions in this and other courts. Many of them may be found collected in a note to 2 Smith's Leading Cases, 545, &c.

In equity, the covenantor is treated as estopped by his covenant to assert that any outstanding title existed inconsistent with what he undertook to sell and convey.

The argument on the part of the appellant is, that, under the 4th section of the Bankrupt Act, he was discharged from all debts, contracts, and other engagements provable under the Act; that not only the debt secured by this mortgage, but the covenant of warranty itself, was provable under the Act. And, consequently, the covenantor, being released from the covenant, it could no longer have the operation allowed to it by the courts of Mississippi.

It must be admitted, that if the covenantee or his assignee had released the covenant, it would be difficult to maintain that it could continue in existence for any purpose. But it must be considered, that whatever discharge has taken place in this case, is by force of a Statute, which may have so qualified and limited its effect as still to leave the covenant in existence for one purpose, though not for others; and that the question, whether it has done so, can be determined only by examining the Act, and ascertaining the will of the Legislature in this particular.

The second section of the Act contains this proviso: "That nothing in this Act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be

valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this Act." There does not appear to have been anything in this mortgage inconsistent with those sections; and it is not denied that the mortgage itself, considered simply as a conveyance of the land, remained unaffected by the Act.

It is therefore obvious, that though the bankrupt, personally, was released by the Act, the debt due from the land continued undischarged. In this particular, beyond all doubt, the discharge by the Act differs from a release by the creditor; since, if the latter had released the debtor, the mortgage would thereby have been satisfied, and the charge on the land destroyed.

The intention of the Legislature to carry out this distinction between the personal liability of the debtor and the liability of the land, and to preserve the latter in full force, unaffected by the discharge of the debtor, is clearly declared by the Act. The Act says, in so many words, that a mortgage, valid by the law of the State, shall not be impaired by anything in the Act.

We think there is sufficient reason why this proviso should be so construed as completely to save the effect and operation of all estoppels running with the land and operating at law to pass the legal title, or in equity to conclude the grantor from asserting the existence of a title inconsistent with what he undertook to sell and convey. The purpose of the Legislature to afford complete and effectual protection to mortgage titles, against anything which was to be done under the Act, and the broad and strong terms in which this purpose is expressed, require us to say, that the debtor cannot derive from the Act an enabling power to do or assert anything which will impair a mortgage otherwise valid. Nor is there any incongruity with established principles, in holding that the personal discharge of the debtor does not free him from the estoppel.

If this obligation could rest solely upon a covenant, effectual in law to charge the grantor in a personal action, it would follow, that when such personal liability was released by the Bankrupt Act, the estoppel would naturally fall with it; and that an intention to preserve the estoppel ought to be clearly indicated, to induce the court to say it was not destroyed; but such estoppels do not depend on personal liability for damages. This is apparent, when we remember that estoppels bind, not only parties, but privies in blood and estate, though not personally liable on the covenants creating the estoppel. See *Carver* v. *Jackson*, 4 Pet. 85, 87; *White* v. *Patten*, 24 Pick. 324; *Mark* v. *Willard*, 13 New Hamp. R. 389; *Baxter* v. *Bradbury*, 20 Maine R. 260.

Indeed, it is the settled doctrine of this court, not only that no existing personal liability is necessary to work an estoppel, but that none need have existed at any time. In *Van Rensselaer* v. *Kearney et al.*, 11 How. 322, it was held, after great consideration and a full examination of the authorities, that "if a deed bear on its face evidence that

the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties; then, although it may not contain any covenants of title, in the technical sense of the term, still, the legal operation and effect of the instrument will be as binding on the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least, so far as to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance."

It is familiar law, also, which was applied in *Carver* v. *Jackson*, 4 Pet. 86, 88, that a mere recital of a fact in a deed is as effectual an estoppel as a covenant. There is no necessary connection, therefore, between the personal liability of the debtor on his covenant, and the estoppel which arises therefrom; and it is not an incongruity for the Legislature to preserve the latter while they discharge the former.

Estoppels which run with the land and work thereon are not mere conclusions; they pass estates, and constitute titles; they are muniments of title, assuring it to the purchaser. Their operation is highly beneficial, tending to produce security of titles; and if a discharge under the bankrupt law were allowed to destroy this mode of assurance, it would in an important particular impair the operation of deeds containing it. This, by the express words of the bankrupt law, is prohibited.

In *Stewart* v. *Anderson*, 10 Alabama R. 504, the Supreme Court of Alabama had this precise question before them, and held the bankrupt estopped. A similar decision was made by the Court of Appeals of Maryland in reference to the effect of a discharge under the insolvent law of that State. *Dorsey* v. *Gasaway*, 2 H. and J. 411.

Our opinion is, that the decree of the High Court of Errors and Appeals of Mississippi should be affirmed, with costs.[1]

Bayard, for the plaintiff in error.

Crittenden, for the defendant.

WEAD *v.* LARKIN.

SUPREME COURT OF ILLINOIS. 1870.

[*Reported* 54 *Ill.* 489.]

APPEAL from the Circuit Court of Cook County; the *Hon. E. S Williams*, Judge, presiding.

This was an action of covenant, brought by Joshua Larkin and others against George F. Harding and Hezekiah M. Wead. The

[1] In *Cole* v. *Raymond*, 9 Gray, 217 (1857), the estoppel by a covenant of warranty was *held* not affected by the fact that the Statute of Limitations had barred all right of action on the covenant.

declaration alleges the breach of a covenant of warranty contained in a deed of conveyance, executed by the defendants to Curtis Worden and Albert Worden, and that the father of the plaintiffs, by conveyance from those grantees, became the assignee of their title, and of the covenant of warranty, and that the plaintiffs succeeded to the same rights by the death of their father.

The form of the covenant counted on is as follows: "And we, the said George F. Harding and H. M. Wead, for ourselves and our heirs, do covenant to and with the said Curtis Worden and Albert Worden, their heirs and assigns, that we will forever warrant and defend the title to said tract of land against all patent titles whatever, and against none other."

A trial resulted in a finding and judgment in favor of the plaintiffs. The case is brought to this court by appeal.

The appellant contends that the action will not lie, because, at the time they executed the deed containing the covenant sued upon, the covenantors were not in actual possession of the land, and had no estate in it of any kind, and therefore the covenant did not run with the land, and the grantee of the immediate covenantee cannot sue.

Mr. J. L. Bennett, for the appellant.

Messrs. Goudy and *Chandler*, for the appellees.

Mr. Chief Justice Lawrence delivered the opinion of the court:

This case has been twice before this court, and will be found reported in 41 Ill. 415, and 49 Ill. 99. The facts are set forth in the opinion in 41 Ill. and it is unnecessary to repeat them here. After a third verdict and judgment against the defendants in the Circuit Court, they again bring the record here and submit it upon a question which has not hitherto been raised. It is now for the first time claimed, that the action will not lie, because the defendants, at the time they executed the deed containing the covenant upon which they are now sued, were not in actual possession of the land, and had no estate in it of any kind. It is contended, in such cases, the covenants in a deed do not run with the land, because there is no estate to which they can attach, and, therefore, the grantee of the immediate covenantee cannot sue.

It is true, it has been held by the current of authorities, that the covenants of seisin, of a right to convey, and that the land is free from encumbrances, being *in presenti*, if broken at all, are broken as soon as made, and becoming at once mere choses in action, do not run with the land, or, in other words, do not pass to the grantee of the immediate covenantee. But, even on this point, there is some contradiction in the authorities, the King's Bench having held, in *Kingdon* v. *Nottle*, 1 Maule & S. 355, and 4 Ib. 53, that the assignee might sue, on the ground that the want of seisin is a continuing breach. So, too, it was held in *Admr. of Backus* v. *McCoy*, 3 Ohio, 211, that the covenant of seisin runs with the land, so long as the purchaser and the successive grantees under him remain in possession, and the rule is enforced by the court with very cogent reasoning.

But if it be true that these covenants *in præsenti* cannot be made the basis of an action by the assignee, it is not denied that the covenant of warranty, which is the covenant in the case at bar, runs with the land and protects the grantee of the covenantee. This was settled in *Spencer's Case*, 5 Coke, and has probably never since been denied. It is claimed, however, in behalf of appellant in the present case, that, although this covenant runs with the land, yet, if the covenantor has neither actual possession nor legal title, there is no estate to which it can attach, and it does not pass to the grantee of the covenantee.

In support of this position, counsel cite the case of *Suter* v. *Rawson*, 1 Metc. 456, and it must be admitted, this doctrine is there announced. The court say: "To support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seised of the land, for by a conveyance without such seisin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach." It is, however, admitted by the court, that if the covenantor is seised in fact, though without title, the covenant does attach and pass to the assignee, and when the same case came again before the court, at a subsequent term, as reported in 6 Metc. 442, the plaintiff was allowed to recover, on the ground, that the covenantor had cut timber and hoop poles from the land, and thus had such a seisin as caused his covenants to attach to the land and pass to the grantee of the covenantee.

Notwithstanding our great respect for that court, this seems to us a very striking instance of the sacrifice of substance to shadow — the true meaning and spirit of a rule, to the mere form of words in which it has been found convenient to express it.

A reason at least technically sound, whether in fact satisfactory or not, can be given why covenants *in præsenti* do not pass to the assignee. The reason assigned for this rule by the courts which maintain it, is, as already stated, that these covenants, if broken at all, are broken as soon as made, and the covenantee thus acquires a mere chose in action, which, under the rules of the common law, cannot pass to an assignee by a conveyance of the land. But not so with the covenant of warranty. That operates only *in futuro*, and is only broken by eviction. It is admitted that it attaches to the land and passes to the assignee, if the covenantor has a seisin in fact, though a wrongful seisin. Why, then, should it not pass to the assignee of the covenantee, if the land is vacant at the time the covenant is made, and the covenantee, as in the present case, enters under his deed and then conveys? If the land were adversely held at the time of the first conveyance, and if the common law, rendering such a conveyance void, were still in force, it might be said, the covenants were void as to the covenantee. But it is admitted in the case at bar, as it was in the Massachusetts case, that the covenant was a valid covenant to the covenantee, even though the covenantor was not in possession of the land. But, it was said, it did not pass to

the assignee, because it attached to the estate, and the assignee took no estate. Yet, if a wrongful seisin on the part of the assignor would cause it to attach to the estate, and pass to remote grantees, and if, in the absence of seisin by the covenantor, the covenant was valid to the covenantee, as is admitted, we should like to inquire why, as soon as the covenantee took possession of the vacant land, the covenant did not then at once attach to the land, and pass with the conveyance of the covenantee? If the question of possession is at all important in reference to the passing of this covenant to an assignee, it is not the possession of the covenantor that is material, but that of the covenantee when he makes his conveyance. Then is the first time that the covenant passes as attached to the estate. When first made, it is made to the covenantee directly and in person, and he takes its benefit by virtue of his contract, and not as an incident to the estate. It can certainly never be held, that if he takes possession and is evicted by paramount title, he cannot recover, because the land was vacant when the deed was made to him. Even then, if we concede that he must take possession before he can pass the covenant to his grantee, as attached to the land, we are wholly unable to see why it does not pass if he has taken possession, or what the possession or non-possession of the covenantor, when the covenant was made, has to do with its passing to the grantee of the covenantee. The cases of *Moore* v. *Merrill*, 17 N. H. 81; *Beddoe's Exrs.* v. *Wadsworth*, 21 Wend. 120, and *Fowler* v. *Poling*, 6 Barb. 166, cited by counsel for appellant, so far from being inconsistent with the position we have here taken, seem rather to support it. The last case was first heard at special term before a single judge, and is reported in 2 Barb. 306. It was held, as in the Massachusetts case, that as the covenantor had no possession, the covenant did not pass to the assignee. An appeal was taken to the General Term, and it was there held, the conveyance by the covenantee in possession passed the covenant to the assignee.

The case of *Nesbitt* v. *Nesbitt*, 1 Taylor N. C. Rep., also cited by counsel for appellant, was one in which the grantors, by the face of their deed, did not purport to convey their own land, but that of their daughter, and covenanted that she should make good the title on her coming of age. The court held the covenants were collateral to the title, and did not pass to the assignee. The decision is based on the peculiar character of the deed and covenants. The question was, whether the covenants in the peculiar deed before the court could pass to an assignee, and did not turn upon the question of possession.

Our conclusion is, that where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee, although the covenantor may not have been in possession at the time of his conveyance. This is the case at bar.

It is not, however, to be supposed, because we do not now lay down a broader rule than is required by the case before us, that we hold, by implication, the covenants would not pass if the immediate covenantee

should convey before taking possession. On the contrary, it would much better comport with the interests of this State, where vacant lands are so largely an article of commerce, to hold that the covenantor, whether sued by an immediate or remote grantee, is estopped by his deed from denying that he had an estate in the lands to which his covenants would attach, and which would pass by deed. The covenant, it is true, passes to the assignee as appendant to the land, but this does not mean the actual title to the land, for, in such cases, no covenants would be needed. They are intended as a protection to the covenantee and his assignees, in case the covenantor has no title, and it is a very extraordinary mode of reasoning which leads to the conclusion, that, if the covenantor's want of title is also accompanied by a want of possession, for that reason he should be excused from liability to the remote grantee. We should be inclined rather to say, that although the covenant of warranty is attached to the land, and for that reason is said, in the books, to pass to the assignee, yet this certainly does not mean that it is attached to the paramount title, nor does it mean that it is attached to an imperfect title, or to possession, and only passes with that, but it means, simply, that it passes by virtue of the privity of estate, created by the successive deeds, each grantor being estopped by his own deed from denying that he has conveyed an estate to which the covenant would attach.

In the case at bar, the defendants conveyed to the Wordens, and in their deed covenanted with them, their heirs and assigns, that they would forever warrant and defend the premises against patent titles. The land was then vacant. The Wordens took possession under their deed, and subsequently sold and conveyed to Larkin, and delivered to him the possession. An action of ejectment was brought against him, pending which he died, and his heirs, the present plaintiffs, having been made parties, judgment passed against them, and they were evicted by a paramount patent title. The covenant of warranty in defendant's deed was never broken until then. It was never a mere chose in action in the hands of the immediate covenantees. No one but these plaintiffs has ever had, or can have, a right of action on this covenant. If they cannot have it, the covenant which was inserted in the deed of defendants, in order to give perpetual security to both immediate and remote grantees, has become a dead letter. And why? The only reason that can be given is, because the covenantors, instead of having a partial title or a tortious possession, had no title nor possession of any sort. Their security is to be found in the completeness with which their covenant has been broken. The reasoning does not commend itself to our judgment.

Judgment affirmed.

CHAPTER X.

DEDICATION.[1]

THE KING *v.* LEAKE.

KING'S BENCH. 1833.

[*Reported* 5 *B. & Ad.* 469.]

INDICTMENT[2] against the inhabitants of Leake for the non-repair of a road. At the trial before *Tindal*, C. J., at the Lincoln Summer Assizes, 1831, a verdict of guilty was entered, subject to the opinion of the court on a case stated: The Commissioners under the Statute of 41 Geo. III., c. 135, for draining certain lands, made a drain about six miles long, and also made a bank on the east side of the drain, with the earth taken from it, in the manner directed by the Statute, and of the average breadth of forty feet. The bank has been used by all persons for about twenty-five years as a public highway for horses, carts, and carriages, without intermission, and is a very convenient and useful road for the public. About two miles of the road, commencing at Bennington Bridge and extending northwards, are in the parish of Leake. The part indicted is that portion of these two miles which lies between Simon's House Bridge and Lade Bank. It is out of repair, as charged in the indictment.

The parish of Leake has always repaired the part of the said road on the east bank from Bennington Bridge to Simon's House Bridge, and from Lade Bank northward as far as the parish of Leake extends; and it was proved that about ten years ago that parish repaired the part of the road now indicted.

If the court should be of opinion that the parish of Leake was liable to repair the part of the road indicted, then the verdict of guilty was to stand; if not, then a verdict of not guilty to be entered.

Whitehurst, for the Crown.

Waddington, contra.

Cur. adv. vult.

PARKE, J. The questions raised on the argument of this case were three: —

1st. Whether it was competent for the persons in whom the soil was vested, to dedicate the use of part of it, to the public, as a highway: it

[1] See *Lade* v. *Shepherd*, 2 Str. 1004; 2 Gray, Cas. Prop. 550.

[2] The statement is abbreviated from that in the report, and parts only of the case and of the opinions are given.

not being disputed but that if they had the power, such dedication had taken place.

2dly, Whether it is necessary in order to charge the parish, that it should have adopted the highway; and if it was,

3dly, Whether the parish had in fact adopted it.

I have never entertained the least doubt upon any of these questions, except the first; upon that I have felt some difficulty; but after much consideration, my opinion is, upon the statements in this case, that the commissioners in whom the property was vested might dedicate part of it to this special use.

[The discussion of this question is omitted.]

Upon the other two questions, I never had any doubt. As to the second, I have always considered it as clear that the parish is at common law bound to repair all *public* highways; this being by the common law, the mode by which each parish contributes its share towards the public burden of repairing all highways, instead of all the public roads being prepared by one general tax. Hence, if a road *be dedicated* to the public, no parish can refuse to repair it. It must bear in that shape its share of the general burden, and its inhabitants receive an equivalent, not in the use of that road in particular, but in the use of all the public roads in the realm. The absence of repair by the parish is indeed a strong circumstance, in point of evidence, to prove that the road is not a public one, — the fact of repair has a contrary effect; but the conduct of the parish in acquiescing or refusing its acquiescence is, in my opinion, immaterial in every other point of view.

The judgment of Mr. Baron Bayley in the case of *Rex* v. *St. Benedict*, 4 B. & A. 450, was cited on the argument as an authority to the contrary; but with every respect for that very learned judge, I must say I cannot accede to the doctrine there laid down, and I am not aware that there is any authority in support of it.

Upon the third question, also, I feel no doubt. The repair by the parish of the part in question is undoubtedly a sufficient adoption, if adoption be necessary, which I am clearly of opinion it is not.

Upon the whole, therefore, I am of opinion that the Crown is entitled to our judgment.

LITTLEDALE, J. A great number of cases have been cited as to what shall be taken to be a dedication of land to the public, so as to establish a highway. I need not advert to these, because I agree in their authority; and I think if this land was not in the peculiar circumstances in which it is placed, there would be a sufficient dedication to make it a public highway.

[The learned judge, however, was of opinion that the commissioners had no power to dedicate to the use of the public as a highway, and therefore he dissented from the judgment of the court.]

DENMAN, C. J. The question raised by this case was, whether the parish of Leake is bound to repair a road which runs along the top of a bank forty feet wide; in other words, whether this, which is unques-

tionably a road *de facto*, is also a road *de jure*. The bank was made in execution of certain works of drainage done under an Act of the second of G. 3, and another Act of the forty-first of G. 3; and it is stated as a fact that "the said bank has been used by all persons for about twenty-five years as a public carriage road without intermission, and is a very useful and convenient road to the public." It is further stated, that part of the indicted portion of the road was repaired by the parish of Leake ten years ago.

[The Chief Justice held that the commissioners had power to dedicate. This part of the opinion is omitted.]

A second point was, that the parish was not stated to have adopted the road, but only to have repaired it on one occasion. If the fact of adoption were necessary, this statement of evidence from which it might be inferred would be insufficient. But I by no means think any distinct act of adoption necessary in order to make a parish liable to repair a public road: I am of opinion that if it is public, the parish is of common right bound to repair it.

Judgment for the Crown.

MERCER *v.* WOODGATE.

Queen's Bench. 1869.

[*Reported L. R. 5 Q. B.* 26.]

Case stated by justices of Worcestershire under 20 & 21 Vict. *c.* 43.

Upon the hearing of an information preferred by the respondent against the appellant under 5 & 6 Wm. 4, *c.* 50, § 72, for unlawfully and wilfully destroying and injuring the surface of a certain highway by ploughing up the same, the following facts were admitted or proved:—

The appellant is the occupier of a field of arable land in the parish of Bellbroughton, across which is a public footpath leading from the village of Bellbroughton to the Stourbridge and Bromsgrove turnpike road and the hamlet of Fairfield; and in September, 1868, in due course of farming, he ploughed the field and ploughed up and destroyed all trace of the footpath.

The appellant *bonâ fide* claimed the right to plough and to continue to plough the footpath, and the previous occupier of the field had so ploughed at all times within living memory.

There was no evidence before the justices either of the existence of the footpath or tillage of the field before living memory; and no witnesses were called on behalf of the appellant, nor was any evidence given of any partial or limited dedication of the land, or of any reservation of the right to plough up the land along the line of footpath, except as otherwise appears by the case.

On the part of the respondent it was contended that the footpath was a highway within the meaning of 5 & 6 Wm. 4, c. 50, and that under the circumstances the justices ought to convict the appellant under § 72 for the destroying and injuring the surface of a highway.

On the part of the appellant it was contended that the footpath was not a highway within the meaning of the Statute, but that if it were, he and the previous occupiers having ploughed it up as long as it was known to have existed, the public had a right only to the use of the footpath subject to its being so ploughed up.

The justices were of opinion that the footpath was a highway within the meaning of the Statute, and that the appellant, having destroyed and injured the surface of the footpath, they were bound in law to find the appellant's acts to be unlawful, no further evidence having been offered of any reservation by the owner, at the time of dedication or presumed dedication, of a right to plough up the surface of the footway; and accordingly they convicted the appellant.

The question for the opinion of the court was, whether the footpath is a highway within 5 & 6 Wm. 4, c. 50; and if so, whether the justices were bound in law to convict the appellant of an unlawful act, or whether the justices would have been justified in finding the acts complained of to be lawful; and whether they had jurisdiction.

If the court should be of opinion that the justices were bound to convict the appellant, and that their jurisdiction was not ousted in consequence of the land having been ploughed at all times when necessary within living memory, the conviction was to be affirmed; otherwise it was to be quashed.

Harington, for the appellant.

Rew, for the respondent.[1]

Cockburn, C. J. I am of opinion that this conviction was wrong. There is no doubt that as far as living memory goes back, while on the one hand, the public has enjoyed this right of way, on the other hand the owner or occupier of the field during the same period has from time to time ploughed up the whole of his field without any regard to the particular track over which the footpath passes. The only proper inference to be drawn is, that the exercise of this right of the owner has been coeval with the exercise of the right of way of the public, and again the proper inference from that is, that the right of the public was granted, or the original dedication of the way was made, subject to this right in the owner periodically to plough up the soil. It must not be lost sight of that there is no obligation upon the owner to dedicate a right of way, nor, on the other hand, is there any obligation on the part of the public to accept the dedication; and therefore, if the owner in the present case has said to the public, you may come across my field as a convenient way, but it must only be subject to my right to plough across it at proper times, and if the

[1] Blackburn, J., during the argument, said: "If there cannot be such a qualified dedication, then there is no evidence of any dedication at all."

public have chosen to accept the dedication on those terms, there is no injustice towards them to hold them bound by the terms; on the contrary, there would be great injustice and hardship to hold there had been an absolute dedication where the owner had clearly only intended a limited dedication. *Rex* v. *Northampton*, 2 M. & S. 262, is a direct authority that there may be in law such a partial dedication; and if there could not, then, as my Brother Blackburn has pointed out, the appellant is in this dilemma, that there is no dedication and no highway at all. Not only would there be injustice in holding otherwise, but it would be productive of mischief to say that such a state of things as shown in this case could not exist; every one knows instances of footpaths ploughed up as the time comes round for ploughing fields; and if the public or parish could insist on converting such paths into gravelled ways, the owners would be chary in allowing any accommodation to the public over their land. I am clearly of opinion that there may be, in law, a partial dedication like that contended for by the appellant in the present case; but if not, then there is no dedication at all shown, and the conviction would be equally wrong.

BLACKBURN, J. I am of the same opinion. I quite agree that when a highway has been dedicated to the public (which as the Lord Chief Justice has said is a purely voluntary act on the part of the owner), anything afterwards done by the owner interfering with that right of way would be a nuisance; and that ploughing up the pathway would be such an interference; and when a highway is dedicated, and the dedication accepted, not only is there a right in the public, but an obligation on the part of the parish to repair. But in the present case, in whatever way the owner may be taken to have given this right of way over his field, the inference from the evidence is, that he did not dedicate it *simpliciter* as a highway, but he dedicated it subject to the right of ploughing it up periodically; and if this right is inconsistent with a grant of a right of way to the public, then there was no dedication at all, and the present owner has a right to stop up the pathway altogether, and so prevent the parish from repairing the path in such a way as to interfere with his ploughing. But I can see no objection, in law, to such a partial dedication. The principle applicable to such cases is enunciated in the judgment of the court in *Fisher* v. *Prowse*, 2 B. & S. at p. 780; 31 L. J. Q. B. at p. 218, very much in the same language as my Lord has used to-day: "It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given

state of circumstances, the owner of the soil should be held bound to alter the state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention."

MELLOR, J. I am of the same opinion. The owner might have dedicated this pathway, in express terms, with a condition attached of ploughing it periodically; and we all know many such paths which the occupiers are constantly in the habit of ploughing up from time to time. Can we do otherwise than infer from the evidence in the present case that this was the limit and condition on which the owner dedicated this footpath? Mr. Rew said that the owner could not dedicate a highway subject to a nuisance, but in all the cases in which such a partial dedication has been sustained the act must have been a nuisance or the question could not have arisen.

HANNEN, J. The authorities cited for the respondent go to this extent only, that where there has been an unrestricted dedication of a right of way, ploughing it up, though in due course of husbandry, would be a nuisance. *Fisher* v. *Prowse*, 2 B. & S. 770; 31 L. J. Q. B. 212, is undistinguishable in principle, and is a distinct authority that there may exist in law a highway subject to be interrupted at certain times when the convenience of the owner of the soil requires it. If this were not the law, the effect would be that all these ways over which the owner has always been used to plough would be stopped up, because in such a case there would be no dedication at all, as is pointed out by Parke, B., in *Poole* v. *Huskinson*, 11 M. & W. at p. 830, "There may be a dedication to the public for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned judge was quite correct; not so the alternative, that as such a partial dedication was invalid in law, it would nevertheless operate against the intention of the owner of the soil, in favor of the whole public. I think it would be merely void. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." It follows that the evidence in the present case shows a partial dedication only, and that either the right of the public is subject to the reservation or there is no dedication at all; in either case, the appellant was wrongly convicted.

Conviction quashed.[1]

[1] Affirmed in *Arnold* v. *Blaker*, in Cam. Scacc. L. R. 6 Q. B. 433 (1871).

BEATTY *v.* KURTZ.

SUPREME COURT OF THE UNITED STATES. 1829.

[*Reported* 2 *Pet.* 566.]

MR. JUSTICE STORY delivered the opinion of the court.[1]

This is an appeal in a suit in equity from a decree of the Circuit Court of the District of Columbia, sitting for the County of Washington.

Georgetown was erected into a town by an Act of the Legislature of Maryland, passed in 1751, ch. 25. By subsequent Acts additions were made to the territorial limits of the town; and the town was created a corporation, with the usual municipal officers, by an Act of the Maryland Legislature, passed in 1789, ch. 23. The charter of incorporation has been subsequently amended by Congress, by various Acts passed upon the subject since the cession.

In the year 1769, Charles Beatty and George F. Hawkins laid out a town, known by the name of Beatty and Hawkins's addition to Georgetown, and which is now included within its corporate limits. The lots of this addition were disposed of by way of lottery, under the direction of commissioners appointed to lay out the same, and conduct the drawing of the lottery. The books of the lottery and the plan of the lots, and a connected survey thereof, were afterwards, by Act passed in 1796, ch. 54, ordered to be recorded in the clerk's office for the Territory of Columbia, and copies thereof to be good evidence in all courts of law and equity in the State. Upon the original plan so recorded, one lot was marked out and inscribed with these words, "for the Lutheran Church;" and this lot was in fact part of the land of which Charles Beatty was seised.

The bill was brought up by the original plaintiffs, alleging themselves to be trustees and agents for the German Lutheran Church, composed of the members of the German Lutheran Church of Georgetown, duly organized as such, *in behalf of themselves and the members of the said church*. It charges the laying out of the lot in question for the sole use and benefit of the Lutheran Church, to be held by them for religious purposes, and the use of the congregation, as above mentioned. That soon afterwards the lot was taken possession of by the said German Lutherans in Georgetown; who organized themselves into a church or congregation, and erected a church or house of worship thereon; and the lot was enclosed by them and a church erected thereon; and hath been kept and held by them during a period of fifty years; and hath been used as a burying ground for the members of the church, with the avowed intention of building thereon another church or place of worship, the first building erected thereon being decayed, whenever their

[1] The opinion only is given.

funds would enable them so to do. That during all this period their possession has never been questioned, and the lot has been exempted from taxation as property set apart for a religious purpose. It further charges that upon the organization of the church or congregation, certain officers, called a committee and trustees, were appointed to take care of the said church, which appointments have been from time to time renewed; that in 1824 the plaintiffs were reappointed as such, having been so appointed at former times. It further charges that Charles Beatty died about sixteen years ago, without having made any conveyance of the said lot, and that Charles A. Beatty, the defendant, is his heir, and has the title by descent; and prays that he may be compelled to convey it to them. It further charges that Ritchie, the other defendant, has unwarrantably disputed their title; and has entered upon the lot and removed some of the tombstones erected thereon, and means to dispossess the plaintiffs and to remove the tombstones and graves. The bill therefore prays that they may be quieted in their possession, and that a writ of injunction may issue, and for further relief.

The defendants put in a joint answer. They admitted that the lot was so marked in the plot as the bill states, and that it was Charles Beatty's intention to appropriate the same to the use of the Lutheran congregation, provided they would build thereon, within a reasonable time, a house of public worship. They deny that the German Lutherans were ever organized, as stated in the bill; or that any such church has been built; or that there has been any such possession or enclosure as the bill asserts; or that Charles Beatty ever made any conveyance of the property to transfer his title. They admit that the lot has been used as a graveyard, but not exclusively appropriated to the use of the Lutheran congregation. They admit that a building was erected thereon, but that it was used as a schoolhouse. They admit that the defendant Beatty is heir-at-law, and as such, that he claims the lot in question, and has authorized the defendant Ritchie to take possession thereof. They deny all the equity in the bill, as well as the authority of the plaintiffs to sue; declaring them to be mere volunteers, and demanding proof of their authority, &c.

The general replication was filed, and the cause came on for a hearing upon the bill, answer, exhibits and depositions; and the court decreed a perpetual injunction against the defendants, with costs. The appeal is brought from that decree.

Upon examining the evidence, it appears to us that the material allegations of the bill are satisfactorily established. It is proved that, shortly after the appropriation, and more than fifty years ago, the Lutherans of Georgetown proceeded to erect a log house on the lot, which was used as a church for public worship, by that denomination of Christians; and was also occasionally, and at different times since, used as a schoolhouse under their direction. That at a much later period, a steeple and bell were added to the building; that the land

was used as a churchyard; that a sexton appointed by Lutherans had the direction of it; that more than half of the lot is covered with graves; and others as well as Lutherans have been buried there; that the Lutherans have caused the lot to be enclosed from time to time, as the fences fell into decay, and procured subscriptions for that purpose; that the possession of the Lutherans, in the manner in which it was exercised over the lot, by erecting a house, by public worship, by enclosing the ground, and by burials, was never questioned by Charles Beatty in his lifetime, or in any manner disturbed until a short period before the commencement of the present suit. That Charles Beatty in his lifetime constantly avowed that the lot was appropriated for the Lutherans, and that they were entitled to it.

The Lutherans have constituted but a small number in the town of Georgetown; they have not been able, therefore, to maintain public worship constantly in the house so erected, during the whole period; and sometimes it has been intermitted for a considerable length of time. But efforts have been constantly made, as far as practicable, to keep together a congregation, to use the means of divine worship, and to support public preaching. The house, however, in consequence of inevitable decay, fell down some time ago; the exact period of which, however, does not appear; but it seems to have been more than forty years after its first erection. Efforts have since been made to rebuild it, but hitherto they have not been successful.

The Lutherans in Georgetown, who have possessed the lot in question, are not and never have been incorporated as a religious society. The congregation has consisted of a voluntary society, acting in its general arrangement by committees and trustees, chosen from time to time by the Lutherans belonging to it. There do not appear to have been any formal records kept of their proceedings; and there have been periods of considerable intermission in their appointment and action. There is no other proof that the plaintiffs are a committee of the congregation, than what arises from the statement of witnesses, that they were so chosen by a meeting of Lutherans, and that their appointment has always been acquiesced in by the Lutherans, and they have assumed to act for them without any question of their authority; that they are themselves Lutherans, living in Georgetown, and forming a part of the voluntary society, is not disputed.

There is decisive evidence also that the defendant Beatty has, since the decease of his father, repeatedly admitted the claim of the Lutherans to the lot, and his willingness that it should remain for them, as it had been originally appropriated. No assertion of ownership was ever made by him, until the acts were committed, which form the gravamen of the present bill.

Such are the material facts; and the principal questions arising upon this posture of the case, are, first, whether the title to the lot in question ever passed from Charles Beatty, so far at least as to amount to a perpetual appropriation of it to the use of the Lutheran Church,

or to the pious uses to which it has been in fact appropriated. And secondly, if so, whether it is competent for the plaintiffs to maintain the present bill.

As to the first question, it is not disputed that Charles Beatty did originally intend that this lot should be appropriated for the use of a Lutheran church in the town laid off by him. But as there was not at that time any church, either corporate or unincorporated, of that denomination in that town, there was no grantee capable of taking the same, immediately by grant. Nor can any presumption of a grant arise from the subsequent lapse of time, since there never has been any such incorporated Lutheran Church there capable of taking the donation. If, therefore, it were necessary that there should be a grantee legally capable of taking, in order to support the donation in this case, it would be utterly void at law, and the land might be resumed at pleasure. To be sure, if an unincorporated society of Lutherans had, upon the faith of such donation, built a church thereon, with the consent of Beatty, that might furnish a strong ground why a court of equity should compel him to convey the same to trustees in perpetuity for their use; or at least to execute a declaration of trust, that he and his heirs should hold the same for their use. For such conduct would amount to a contract with the persons so building the church, that he would perfect the donation in their favor; and a refusal to do it would be a fraud upon them which a court of equity ought to redress. And if the town of Georgetown had been capable of holding such a lot for such uses, there would be no difficulty in considering the town as the grantee under such circumstances; since the uses would be of a public and pious nature, beneficial to the inhabitants generally. But it does not appear that Georgetown, in 1769, or indeed until its incorporation in 1789, was a corporation, so as to be capable of holding lands as an incident to its corporate powers.

If the appropriation, therefore, is to be deemed valid at all, it must be upon other principles than those which ordinarily apply between grantor and grantee. And we think it may be supported as a dedication of the lot to public and pious uses. The Bill of Rights of Maryland gives validity to "any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying-ground, which shall be improved, enjoyed, or used only for such purpose." To this extent, at least, it recognizes the doctrines of the Statute of Elizabeth for Charitable Uses, under which it is well known, that such leases would be upheld, although there were no specific grantee or trustee. In the case of *The Town of Pawlet* v. *Clarke*, 9 Cranch, 292, 331, this court considered cases of an appropriation or dedication of property to particular or religious uses, as an exception to the general rule requiring a particular grantee; and like the dedication of a highway to the public. (See also *Brown* v. *Porter*, 10 Mass. Rep. 93; *Weston* v. *Hunt*, 2 Mass. Rep. 500; *Inhabitants of Shapleigh* v. *Gilman*, 13 Mass.

Rep. 190; *Barrad's Case*, 12 Jac. C. B.; 2 Mod. Ent. 413 b.) There is no pretence to say, that the present appropriation was ever attempted to be withdrawn by Charles Beatty during his lifetime, and he did not die until about sixteen years ago. On the contrary, the original plan and appropriation were constantly kept in view by all the legislative Acts passed on the subject of this addition. The plan was required to be recorded as an evidence of title, and its incorporation into the limits of Georgetown had reference to it. We think then it might at all times have been enforced as a charitable and pious use, through the intervention of the government as *parens patriæ*, by its attorney-general or other law officer. It was originally consecrated for a religious purpose: it has become a depository of the dead; and it cannot now be resumed by the heirs of Charles Beatty.

The next question is as to the competency of the plaintiffs to maintain the present suit. If they were proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession, under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case, where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.

The only difficulty is whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary, to decide the case on this point, we should incline to think that under all the circumstances it might be fairly presumed. But it is not necessary to decide the case on this point; because, we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society; for purposes common to all, and beneficial to all. Thus, some of the parishioners may sue a parson to establish a general *modus*, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may

sue for an account against others, without joining all. (Cooper's Eq. Plead. 40, 41; Mitf. Plead. 145.)

And upon the whole we are of opinion, that the decree of the Circuit Court ought to be affirmed, with costs.[1]

The cause was argued for the appellants, by *Mr. C. C. Lee;* and for the appellees, by *Messrs. Key* and *Dunlop.*

CINCINNATI *v.* WHITE.

SUPREME COURT OF THE UNITED STATES. 1832.

[*Reported* 6 *Pet.* 431.]

THIS was a writ of error to the Circuit Court of the District of Ohio.

The case came before the court on a bill of exceptions, taken by the plaintiffs in error, the defendants in the Circuit Court, to the instructions given by the court to the jury on the request of the counsel for the plaintiffs in that court; and to the refusal of the court to give certain instructions as prayed for by the defendants below.

In the opinion of the court no decision is given on those exceptions, save only on that which presented the question of the dedication of the land in controversy for the use of the city of Cincinnati; which, and the facts of the case connected therewith, are fully stated in the opinion of the court. The arguments of the counsel in the case, on the matters of law presented by the exceptions, are therefore necessarily omitted.

The case was argued by *Mr. Storer* and *Mr. Webster*, for the plaintiffs in error; and by *Mr. Ewing* and *Mr. Clay*, for the defendants.

MR. JUSTICE THOMPSON delivered the opinion of the court.

The ejectment in this case was brought by Edward White, who is also the defendant in error, to recover possession of a small lot of ground in the city of Cincinnati, lying in that part of the city usually denominated the Common. To a right understanding of the question upon which the opinion of the court rests, it will be sufficient to state generally, that on the 15th of October in the year 1788, John Cleves Symmes entered into a contract with the then board of treasury, under the direction of Congress, for the purchase of a large tract of land, then a wilderness, including that where the city of Cincinnati now stands.

[1] If a layman, by the dissolution of monasteries, hath a monastery in which there is a church, part of it, and he suffers the parishioners for a long time to come there to hear divine service, and to use it as a parish church; that shall give a jurisdiction to the ordinary to order the seats; because that now, in fact, it becomes the parish church, which before was not subject to the ordinary: adjudged 12 Ja. C. B.; *Buzzard's Case*, 2 Mod. E. 413, 6. — REP.

See *Mowry* v. *Providence*, 10 R. I. 52 (1871).

Some negotiations relative to the payments for the land delayed the consummation of the contract for several years. But on the 30th of September, 1794, a patent was issued conveying to Symmes and his associates, the land contracted for; and as Symmes was the only person named in the patent, the fee was of course vested in him.

Before the issuing of the patent, however, and, as the witnesses say, in the year 1788, Mathias Denman purchased of Symmes a part of the tract included in the patent, and embracing the land whereon Cincinnati now stands. That in the same year, Denman sold one third of his purchase to Israel Ludlow, and one third to Robert Patterson. These three persons, Denman, Ludlow and Patterson, being the equitable owners of the land (no legal title having been granted), proceeded in January 1789 to lay out the town. A plan was made and approved of by all the proprietors; and according to which the ground lying between Front Street and the river, and so located as to include the premises in question, was set apart as a common, for the use and benefit of the town forever, reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common.

The lessor of the plaintiff made title to the premises in question under Mathias Denman, and produced in evidence a copy, duly authenticated, of the location of the fraction 17 from the books of John C. Symmes to Mathias Denman, as follows: "1791, April 4, Captain Israel Ludlow, in behalf of Mr. Mathias Denman of New Jersey, presents for entry and location a warrant for one fraction of a section, or one hundred and seven acres and eight tenths of an acre of land, by virtue of which he locates the seventeenth fractional section in the fourth fractional township, east of the Great Miami river, in the first fractional range of townships on the Ohio river; number of the warrant 192." In March 1795, Denman conveyed his interest, which was only an equitable interest, in the lands so located to Joel Williams; and on the 14th of February 1800 John Cleves Symmes conveyed to Joel Williams in fee, certain lands described in the deed which included the premises in question; and on the 16th of April 1800, Joel Williams conveyed to John Daily the lot now in question. And the lessor of the plaintiff, by sundry mesne conveyances, deduces a title to the premises to himself.

In the course of the trial several exceptions were taken to the ruling of the court, with respect to the evidence offered on the part of the plaintiff in making out his claim of title. But in the view which the court has taken of what may be considered the substantial merits of the case, it becomes unnecessary to notice those exceptions.

The merits of the case will properly arise upon one of the instructions given by the court, as asked by the plaintiff; and in refusing to give one of the instructions asked on the part of the defendant. At the request of the plaintiff, the court instructed the jury, "that to enable the city to hold this ground and defend themselves in this action by possession, they must show an unequivocal, uninterrupted possession for at least twenty years."

On the part of the defendants, the court was asked to instruct the jury, "that it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the whole estate of the said proprietors in said land, thus reserved and dedicated, became the property of, and was vested in the public, for the purposes intended by the said proprietors; and that, by such dedication and reservation, the said original proprietors, and all persons claiming under them, are estopped from asserting any claim or right to the said land thus reserved and dedicated." The court refused to give the instruction as asked, but gave the following instruction:

"That it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the right of *use* to such part, is vested in the public for the purposes designated; but that such reservation and dedication do not invest the public with the fee."

The ruling of the court to be collected from these instructions was, that although there might be a parol reservation and dedication to the public of the *use* of lands; yet such reservation and dedication did not invest the public with the fee; and that a possession and enjoyment of the use for less than twenty years, was not a defence in this action.

The decision and direction of the Circuit Court upon those points, come up on a writ of error to this court.

It is proper in the first place to observe, that although the land which is in dispute, and a part of which is the lot now in question, has been spoken of by the witnesses as having been set apart by the proprietors as a common, we are not to understand the term as used by them in its strict legal sense; as being a right or profit which one man may have in the lands of another; but in its popular sense, as a piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants of the town.

Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor; and secure to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication.

It was admitted at the bar, that dedications of land for charitable and religious purposes, and for public highways, were valid, without any grantee to whom the fee could be conveyed. Although such are

the cases which most frequently occur and are to be found in the books. It is not perceived how any well grounded distinction can be made between such cases and the present. The same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public use, where there is no grantee *in esse* to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case. In this class of cases there may be instances, contrary to the general rule, where the fee may remain in abeyance until there is a grantee capable of taking; where the object and purpose of the appropriation look to a future grantee in whom the fee is to vest. But the validity of the dedication does not depend on this; it will preclude the party making the appropriation from reasserting any right over the land; at all events so long as it remains in public use: although there may never arise any grantee capable of taking the fee.

The recent case of *Beatty* v. *Kurtz*, 2 Peters, 566, in this court, is somewhat analogous to the present. There a lot of ground had been marked out upon the original plan of an addition to Georgetown, "*for the Lutheran Church*," and had been used as a place of burial from the time of the dedication. There was not, however, at the time of the appropriation, or at any time afterwards, any incorporated Lutheran church capable of taking the donation.

The case turned upon the question, whether the title to the lot ever passed from Charles Beatty, so far as to amount to a perpetual appropriation of it to the use of the Lutheran church. That was a parol dedication only, and designated on the plan of the town. The principal objection relied upon was, that there was no grantee capable of taking the grant. But the court sustained the donation, on the ground that it was a dedication of the lot to public and pious uses; adopting the principle that had been laid down in the case of the *Town of Pawlet* v. *Clark*, 9 Cranch, 292, that appropriations of this description were exceptions to the general rule requiring a grantee. That it was like a dedication of a highway to the public. This last remark shows that the case did not turn upon the Bill of Rights of Maryland, or the Statute of Elizabeth relating to charitable uses, but rested upon more general principles; as is evident from what fell from the court in the case of the *Town of Pawlet* v. *Clark*, which was a dedication to religious uses; yet the court said this was not a novel doctrine in the common law. In the familiar case where a man lays out a street or public highway over his land, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. And in support of the principle, the case of *Lade* v. *Shepherd*, 2 Stra. 1004, was referred to; which was an action of trespass, and the place where the supposed trespass was committed, was formerly the property of the plaintiff, who had laid out a street upon it, which had continued thereafter to be used as a public highway; and it was insisted on the part

of the defendant, that by the plaintiff's making a street, it was a dedication of it to the public, and that although he, the defendant, might be liable for a nuisance, the plaintiff could not sue him for a trespass. But the court said, it is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage; but it never was understood to be a transfer of his absolute property in the soil.

The doctrine necessarily growing out of that case, has a strong bearing upon the one now before the court, in two points of view. It shows, in the first place, that no deed or writing was necessary to constitute a valid dedication of the easement. All that was done, from anything that appears in the case, was barely laying out the street by the owner, across his land. And in the second place, that it is not necessary that the fee of the land should pass, in order to secure the easement to the public. And this must necessarily be so from the nature of the case, in the dedication of all public highways. There is no grantee to take immediately, nor is any one contemplated by the party to take the fee at any future day. No grant or conveyance can be necessary to pass the fee out of the owner of the land, and let it remain in abeyance until a grantee shall come *in esse*; and indeed the case referred to in Strange considers the fee as remaining in the original owner; otherwise he could sustain no action for a private injury to the soil, he having transferred to the public the actual possession.

If this is the doctrine of the law applicable to highways, it must apply with equal force, and in all its parts, to all dedications of land to public uses; and it was so applied by this court to the reservation of a public spring of water for public use, in the case of *M'Connell* v. *The Trustees of the Town of Lexington*, 12 Wheat. 582. The court said; the reasonableness of reserving a public spring for public use, the concurrent opinion of all the settlers that it was so reserved, the universal admission of all that it was never understood that the spring lot was drawn by any person, and the early appropriation of it to public purposes; were decisive against the claim.

The right of the public to the use of the common in Cincinnati, must rest on the same principles as the right to the use of the streets; and no one will contend, that the original owners, after having land out streets, and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public.

All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati; and doubtless

greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds.

And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

The right of the public in such cases does not depend upon a twenty years' possession. Such a doctrine, applied to public highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and private right.

The case of *Jarvis* v. *Dean*, 3 Bingham, 447, shows that rights of this description do not rest upon length of possession. The plaintiff's right to recover in that case, turned upon the question whether a certain street in the parish of Islington had been dedicated to the public as a common public highway. Chief-Justice Best, upon the trial, told the jury that if they thought the street had been used for years as a public thoroughfare, with the assent of the owner of the soil, they might presume a dedication; and the jury found a verdict for the plaintiff, and the court refused to grant a new trial, but sanctioned the direction given to the jury and the verdict found thereupon; although this street had been used as a public road only four or five years; the court saying, the jury were warranted in presuming it was used with the full assent of the owner of the soil. The point therefore upon which the establishment of the public street rested, was whether it had been used by the public as such, *with the assent* of the owner of the soil; not whether such use had been for a length of time, which would give the right by force of the possession; nor whether a grant might be presumed; but whether it had been used with the assent of the owner of the land; necessarily implying, that the mere naked fee of the land remained in the owner of the soil, but that it became a public street, by his permission to have it used as such. Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

In the present case, the fact of dedication to public use, is not left to inference, from the circumstance that the land has been enjoyed as a common for many years. But the actual appropriation for that purpose is established by the most positive and conclusive evidence. And indeed the testimony is such as would have warranted the jury in presuming a grant, if that had been necessary. And the fee might be considered in abeyance, until a competent grantee appeared to receive it, which was as early as the year 1802, when the city was incorporated. And the common having then been taken under the charge and

direction of the trustees, would be amply sufficient, to show an acceptance, if that was necessary, for securing the protection of the public right.

But it has been argued, that this appropriation was a nullity, because the proprietors, Denman, Ludlow and Patterson, when they laid out the town of Cincinnati, and appropriated this ground as a common, in the year 1789, had no title to the land, as the patent to Symmes was not issued until the year 1794. It is undoubtedly true that no legal title had passed from the United States to Symmes. But the proprietors had purchased of Symmes all his equitable right to their part of the tract which he had under his contract with the government. This objection is more specious than solid, and does not draw after it the conclusions alleged at the bar.

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of Jarvis and Dean, already referred to, with respect to a street; and the same rule must apply to all public dedications; and from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed. In the present case, there having been an actual dedication fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of *Rex* v. *Lloyd*, 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the land but the mere naked fee. And the assent of the proprietors to the dedication continuing, it has the same effect and operation as if it had originally been made after the patent issued. It may be considered a subsequent ratification and affirmance of the first appropriation. And it is very satisfactorily proved, that Joel Williams, from whom the lessor of the plaintiff deduces his title, well understood, when he purchased of Denman, and for some years before, that this ground had been dedicated as a public common by the proprietors. The original plat, exhibiting this ground as a common, was delivered to him at the time of the purchase. And when he afterwards, in the year 1800, took a deed from Symmes, he must, according to the evidence in the case, have known, that he was a mere trustee, holding only the naked fee. And from the notoriety of the fact, that these grounds

were laid open and used as a common; it is fairly to be presumed, that all subsequent purchasers had full knowledge of the fact.

But it is contended that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the Circuit Court, in the fourth instruction asked by the plaintiff, and given by the court, viz. "that if the said proprietors did appropriate said ground, having no title thereto, and afterwards acquired an equitable title only, that equitable title could not inure so as to vest a legal title in the city or citizens, and enable them to defend themselves in an action of ejectment brought against them by a person holding the legal title."

We do not accede to this doctrine. For should it be admitted, that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment.

This is a possessory action, and the plaintiff, to entitle himself to recover, must have *the right of possession*; and whatever takes away this right of possession, will deprive him of the remedy by ejectment. Adams's Eject. 32. Starkie, part 4, 506, 507.

This is the rule laid down by Lord Mansfield in *Atkins* v. *Hordt*, 1 Burr. 119. An ejectment, says he, is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property. And in the case of *Doe* v. *Staple*, 2 Durn. and East, 684, it was held, that although an outstanding satisfied term may be presumed to be surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. Thereby clearly showing the plaintiff must have, not only the legal title, but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment. And in the case of *Doe* v. *Jackson*, 2 Dowl. and Ryl. 523, Bayley, Justice, says, "an action of ejectment, which from first to last is a fictitious remedy, is founded on the principle, that the tenant in possession is a wrong-doer; and unless he is so at the time the action is brought, the plaintiff cannot recover."

If then it is indispensable that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrong-doers; it is difficult to perceive on what grounds this action can be sustained.

The later authorities in England which have been referred to, leave it at least questionable, whether the doctrine of Lord Mansfield in the case of *Goodtitle* v. *Alker*, 1 Burr. 143, "that ejectment will lie by the owner of the soil for land, which is subject to a passage over it as the king's highway;" would be sustained at the present day at Westminster Hall. It was not even at that day considered a settled point,

for the counsel on the argument (page 140) referred to a case, said to have been decided by Lord Hardwicke; in which he held that no possession could be delivered of the soil of a highway, and therefore no ejectment would lie for it.

This doctrine of Lord Mansfield has crept into most of our elementary treatises on the action of ejectment, and has apparently, in some instances, been incidentally sanctioned by judges. But we are not aware of its having been adopted in any other case where it was the direct point in judgment. No such case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the Supreme Court of Errors of Connecticut, where the contrary doctrine has been asserted and sustained by reasons much more satisfactory than those upon which the case in Burrow is made to rest. *Stiles* v. *Curtis*, 4 Day, 328; *Peck* v. *Smith*, 1 Con. Rep. 103.

But if we look at the action of ejectment on principle, and inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff.

The purpose for which the action is brought, is not to try the mere abstract right to the soil, but to obtain actual possession: the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right. That right consists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of his action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement, or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said, by Mr. Justice Smith in the case of *Stiles* v. *Curtis*, that the execution of a judgment in such case, involves as great an inconsistency as to issue an *habere facias possessionem* of certain premises to A., subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

It is said in the case in Burrow, that an ejectment could be maintained because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony

with the public right. So, also, if the fee is supposed to remain in the original owner, cases may arise where perhaps waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with the public right. But a recovery in an action of ejectment, if carried into execution, is directly repugnant to the public right.

Upon the whole, the opinion of the court is, that the judgment must be reversed, and the cause sent back, with directions to issue a *venire de novo*.[1]

REED *v.* NORTHFIELD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[*Reported* 13 *Pick.* 94.][2]

THIS was an action on the case, upon Stat. 1786, *c.* 81, to recover double damages for an injury to the plaintiff, caused by a defect in a highway in the town of Northfield.

The defect complained of was a hole in the road, by the side of a small bridge. The plaintiff alleged that the horse on which he was riding, stepped into the hole, and fell, and threw the plaintiff over his head.

At the trial, before *Morton*, J., it was agreed that the road had been known and used as a public highway, for fifty years before the injury to the plaintiff, and as such, during that time, had been repaired by the town of Northfield. The defendants objected to the sufficiency of these facts to show such a highway as would render the defendants liable in this action; but the judge overruled the objection, and instructed the jury that they were sufficient.

The jury returned a verdict for the plaintiff, and the defendants excepted.

[1] The Supreme Court of New York, in *Pearsall* v. *Post*, 20 Wend. 111 (1838), refused to extend the doctrine of dedication to a public landing-place, and the judgment was affirmed in the Court of Errors, 8. c. 22 Wend. 425 (1839); though one member at least of the court thought the decision should be placed on another ground. This case was approved by GRIER, C. J., in *O'Neill* v. *Annett*, 3 Dutch. 299 (1859). But decisions to the contrary have been made in *Godfrey* v. *Alton*, 12 Ill. 29 (1850), and *Murdock* v. *Wilkins*, 13 Minn. 13 (1868).

The doctrine has been extended to land for public schools. *Kinkaeser* v. *M'Keesport*, 11 Pa. 444 (1849); *Carpenteria School District* v. *Heath*, 56 Cal. 468 (1880).

Not, however, to railroad stations. *Todd* v. *Pittsburg R. R. Co.*, 19 Ohio St. 514 (1869).

It was held in *Hooker* v. *Trustees of Sandy Hill*, 6 Hill, 407 (1844), and *Pierce* v. *Spafford*, 53 Vt. 394 (1881), that land could be dedicated for a burying-ground. (In the former case the dedication was for a burying-ground for the inhabitants of the town.)

[2] Part only of the case is given.

Dewey, *R. E. Newcomb*, and *H. G. Newcomb*, for the defendants.

Wells, for the plaintiff.

SHAW, C. J., afterward drew up the opinion of the court. On the trial of this action against the town of Northfield, for injury sustained by the plaintiff, by the insufficiency of a highway, several objections were taken by the defendants to the directions of the judge in matters of law, which have now been considered.

It was among other things objected, that the *locus in quo* was not sufficiently proved to be a highway, by the facts shown. These facts were, that it had been known and used as a public highway for fifty years, and during that time had been repaired by the town. It is analogous to a right of way, or other easement; which, it has been recently decided, may be held by prescription, by proving a use for forty years. *Kent* v. *Waite*, 10 Pick. 138; *Melvin* v. *Whiting*, Ibid. 295. Whether a public right of way can be established by dedication and tacit adoption, by a presumed grant, or by any other mode, in a period short of forty years, we do not now give any opinion.

But if an uninterrupted use of a highway and the support of it by the town for forty years, which is now the longest term of prescription known to the law, would not establish it, it would be equivalent to declaring that there can be no highway proved in any mode but by the record of its being laid out; which, in regard to many, and those the most important and ancient highways of the commonwealth, would be utterly impossible. But without dwelling upon the supposed inconvenience of a different rule, we think it clear upon principle, that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment, that they were, at some anterior period, laid out and established by competent authority.[1]

[1] "No doubt, in the early settlement of the country, when lands were commonly granted to a company of proprietors, public ways were reserved, when the lands were surveyed and allotted, which have remained open and public ways to the present time, of which there is no record. That these are, in all respects, highways, is a point too well established to require authorities. To establish such a way, where there is no proof of dedication, and where the element of dedication does not subsist, it will be necessary to prove actual public use, general, uninterrupted, continued for a certain length of time. In general, it must be such as to warrant a presumption of laying out, dedication or appropriation, by parties having authority so to lay out, or a right so to appropriate, like that of prescription or non-appearing grant in case of individuals. It stands upon the same legal grounds, a presumption that whatever was necessary to give the act legal effect and operation was rightly done, though no other evidence of it can now be produced except the actual enjoyment of the benefits conferred by it. By the Rev. Stats. *c.* 25, § 26, the actual repair of such a road by the town or person liable for its defects is made conclusive evidence of its location.

"The only point which would seem to admit of any question is the length of time through which such actual use and enjoyment must have existed, to establish such way by prescription. The policy of the law has been for some years past to shorten such time. In *Williams* v. *Cummington*, 18 Pick. 312, it was held that such a use for thirty-eight years was sufficient. This was held, not because the term of thirty-eight years is fixed by any Statute, rule of law, or usage, but it happened to be the

STATE v. BRADBURY.

SUPREME JUDICIAL COURT OF MAINE. 1855.

[*Reported* 39 *Me.* 154.]

APPLETON, J.[1] The defendant was indicted for a nuisance, by erecting or maintaining a building upon a common highway and public road, in the town of Oldtown. By R. S., c. 1, § 3, R. 6, "the word highway may be construed to include county bridges, and as equivalent to county road or county way." The origin of the road in dispute is shown to have been by dedication of the owner and for private purposes. If it be regarded as either a private or town way, it is not a highway within the meaning of the term, and the government, in such case, will have failed to sustain the allegation in the indictment, that it is a public highway. *State* v. *Sturtivant*, 18 Maine, 66; *State* v. *Strong*, 25 Maine, 298.

It is obvious that injuries to travellers might occur in passing over roads, which had been used and repaired by the public, without having been legally laid out, and when the town, in which they were located, would not be legally liable in consequence of such defect in their legal location. To meet this class of cases, provision was made by R. S., c. 25, § 101, by which it was enacted, that if "it shall appear that the county, town, or plantation, against which such suit is brought, has at any time, within six years before such injury, made repairs on such way or bridge, it shall not be competent for such county, town, or plantation, to deny the location thereof." It was held, in *State* v. *Strong*, 25 Maine, 297, that this did not prevent the town, when indicted for neglecting to repair such highway, from denying its existence.

The evidence satisfactorily establishes the origin of the road, and that it was dedicated to the public by the owner of the land over which it passed. It is not alleged, or pretended, that this road has been laid out according to the provisions of the Statutes regulating the laying out of highways.

Having been dedicated to, and having been used by, the public, after such dedication, for a period short of twenty years, the inquiry arises, whether the town of Oldtown has so assented to, or accepted the way thus dedicated, that the same has become a public highway, which they are liable to keep in repair and for the non-repair of which they may be indicted.

time in that case, and the case was not governed by Stat. 1786, c. 67, § 7, prescribing a term of forty years in certain cases. On the contrary, it is put upon the ordinary ground of prescription and presumption of a non-appearing grant or record, which we now consider as fixed at twenty years." — Per SHAW, C. J., in *Lunenburg* v. *Tisbury*, 9 Gray, 73, 74, 75 (1855).

See also *Commonwealth* v. *Cheney*, 128 Mass. 63.

[1] The opinion only is given.

It appears that at times the officers of the town have forbidden the surveyors, in the district in which the way is located, doing any labor thereupon. It likewise appears, that at other times work has been done upon the same, by the acting surveyor, or surveyors, of the town of Oldtown.

Among other instructions, the presiding judge instructed the jury, "that if Wadleigh made out a plan of lot No. 15, and laid out lots and streets, such streets would be only private streets until accepted by the public, when they would become public streets; that the dedication might be shown, on the part of the party making it, by acts or declarations, but to make it a legal street, it must have been accepted by the legal authorities of the town; that if the surveyors of the town repaired said way, it would be an acceptance by the town; that three or four days work would be such an acceptance; that if Hiram Smith, in 1844, as surveyor, gravelled said street, it would be an acceptance; and that if any person, acting as a surveyor, performed these acts upon the street, it would be sufficient; and that if the government had proved that the surveyors acted as such, it was not necessary to show further, by the records of the town, that they were duly elected or appointed; or that the way in question was assigned to such surveyor by the selectmen of the town; *that if thus dedicated and thus accepted, it would then become a highway*, if generally used by the public, without proof of use for any particular length of time."

The dedication of a road to the public is the act of the person dedicating. The evidence is satisfactory as to the fact of such dedication. In England, it was formerly held, that the assent of the inhabitants of the parish was necessary to give it validity, but more recently the law has there been held otherwise. *Rex* v. *Leake*, 5 B. & Adol. 462. In this country, the weight of authority is in favor of the necessity of acceptance, to render the corporation liable, in case the road dedicated and accepted should become out of repair.

It is not enough to sustain the present indictment, to show that the town had accepted the road as a town way; for the defendant is not indicted for a nuisance to a town way. The cases already cited, show that it cannot be sustained by proof of the existence of a town or private way. *State* v. *Strong*, 25 Maine, 297.

The question raised by the instructions given, are of no slight practical importance; for if an acting surveyor, by a single act of labor, or by a series of acts, can give a binding assent to the dedication of a public highway, or a town way, so as to render the inhabitants liable to indictment for any defect, or want of repair of such ways, then the Statute may be utterly disregarded, and the power of establishing and laying out ways, may be practically exercised without the knowledge and against the wishes of the inhabitants of the town, and without recourse to the constituted authorities to whom this subject has been intrusted.

The location of county roads is conferred by law upon county commissioners.

The authority of an highway surveyor is solely derived from the Statute. No power to bind the town, by assenting to the dedication of a road, by laboring upon one which has been dedicated, is there perceived. If he has such power, then by one day's labor upon a dedicated road, he may render the town liable to indictment in all cases, whenever it should become out of repair. The location of public ways would be withdrawn from the constituted authorities, and any landowner, with the co-operation of a surveyor, may establish roads *ad libitum*, and impose upon the public all the obligation of keeping them in repair, notwithstanding they may be unnecessary or inexpedient.

It was held, in *Rowell* v. *Montville*, 4 Greenl. 270, that no adverse appropriation or use of land, as a road, for a period short of twenty years, was sufficient to raise the presumption of a grant: nor to impose upon the town the obligation to pay damages occasioned by its neglect to keep the road in repair. In *State* v. *New Boston*, 11 N. H. 413, the court say, that "an express, formal dedication to the public, an acceptance by some public agent, properly authorized, or by long use of the public, would, upon the authorities, constitute a public highway: though, unless there had been an acceptance, express or implied, it seems the road would not become a highway." "Any individual," says Ruggles, C. J., in *Oswego* v. *Oswego Canal Co.*, 2 Selden, 257, "may lay out a way or a thoroughfare through his own land, and may dedicate it as such to the public use. But such dedication does not confer upon the towns, in which the lands lie, the duty of improving or keeping in repair as a public highway, the land so dedicated. This will conclusively appear from a reference to the provisions, which have been in force in our Highway Acts for half a century. The power of laying out, altering and discontinuing highways, has been exclusively conferred on the commissioners of highways in the respective towns. . . . Streets and roads dedicated by individuals to public use, but not adopted by the local public authorities, or declared highways by Statute, are not highways within the meaning of the Highway Acts."

In *Remington* v. *Millard*, 1 R. I. 93, the court say, that under the Statute of Rhode Island, the fact that the town council has declared a way to be an open highway and has ordered it to be repaired at the expense of the town, is not evidence of an acceptance by the public, because the town council is not to be deemed the general agent of the public. In no case is a declaration of a town council of any binding force, unless the way has been actually used as a highway for twenty years. It was decided in South Carolina, that there must be some act of acceptance by the constituted authorities where a way has been dedicated. *State* v. *Carver*, 5 Strobh. 217. A road dedicated to the public must be accepted by the county court, on its records, before it can be a public road *Kelley's Case*, 8 Grat. 632. "It is clear," remarks Leigh, J., in this case, "that there must be, not only a dedication, but an acceptance. What constitutes the latter? Is the mere passing over the road by individuals an acceptance? If so, what numbers must pass to amount to one? Obviously if the acceptance depends

upon the number of passers, there will often be great uncertainty whether the road is public or not, which may give rise to much troublesome litigation. To guard against this uncertainty and litigation, the right of acceptance ought to be in some public body." It was held, in *Hyde* v. *Jamaica*, 27 Vermont, 443, that a town must accept a road dedicated to them before they will be bound to keep it in repair, and that a highway surveyor has no power to adopt as public highways, roads already travelled. "To constitute a highway by dedication, which the town are bound to repair, there must be," says Bennet, J., "a dedication of the land by the owner, and an acceptance of the dedication by the town; otherwise it would be in the power of an individual to impose upon a town a liability to make and keep in repair a road *nolens volens*." So in *Curtis* v. *Hope*, 19 Conn. 154, it was held, that to create a highway by adoption, the road must have been made and accepted by the public.

The conclusion is, that an highway surveyor, *as such*, has no authority to accept a way which has been dedicated to the public.

The case of *Hobbs* v. *Lowell*, 19 Pick. 405, has been pressed upon our consideration, as establishing the law as given in the instructions, to which exceptions have been alleged. The authority of that case is weakened by the very elaborate and able opinion of Morton, J. In that case, in the conclusion of his opinion, Shaw, C. J., says, "we consider the questions, whether the assent of the public is necessary to an effectual dedication, and how it is to be given or withheld, do not arise in the present case, and the court gives no opinion upon them; they must be considered as open for consideration whenever they occur."

The government were bound to show the road a public highway. They have failed to do so. There is and can be no authority on the part of a surveyor to assent to, or accept, a dedication of a way, so as to make the same a public highway or county road, and render the town liable to indictment for its want of repair. The instructions given were erroneous, and a new trial must be granted.

RICE, J., concurred in the result.

Exceptions sustained, and new trial granted.

Knowles, for defendant.

Abbott, Attorney-General, for the State.

NOTE. — In *Holdane* v. *Trustees of Cold Spring*, 21 N. Y. 474 (1860), one of the grounds of decision was that until the dedication had been accepted, the owner of the land had a right to revoke it; and the same law was held in *Le* v. *Seeley Hall*, 40 N. Y. 442 (1869); but *Trustees of M. E. Church* v. *Hoboken*, 13 N. J. L. (1 Vroom) 13 (1868), is *contra*.

Whether, in the United States, user by the public for a time less than the period of prescription is sufficient acceptance of a dedication, *quære*. *See Mann* v. *Elgin*, 24 Ill. App. 419.

See also *Hanson* v. *Taylor*, 23 Wis. 547; *Baker* v. *Johnston*, 21 Mich. 319.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 772 167 3